IN THE

Supreme Court of the United States

October Term 1970

No. 45 Original

Supreme Court, U.S.
FILED
AUG 5 1970
E. ROBERT SEAVER, CLERK

STATE OF WASHINGTON, STATE OF ILLINOIS,
STATE OF ARIZONA, STATE OF COLORADO,
STATE OF HAWAII, STATE OF IOWA,
STATE OF KANSAS, STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MINNESOTA, STATE OF MISSOURI,
STATE OF OHIO, STATE OF RHODE ISLAND,
STATE OF VERMONT, AND COMMONWEALTH OF VIRGINIA,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland corporation, and
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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AMERICAN MOTORS CORPORATION,
a Maryland corporation, and
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

Each of the above-named Plaintiff States respectfully asks leave of this Court to file the Complaint which is submitted herewith.

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a Maryland corporation, and
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

COMPLAINT

COUNT I
SHERMAN ACT VIOLATION

Jurisdiction

1. The original jurisdiction of this Court is invoked under the authority of Article III, Section 2 of the Constitution of the United States and 28 U.S.C. §1251(b)(3).

2. This action is brought under 15 U.S.C. §26 commonly referred to as Section 16 of the Clayton Act to restrain the defendants from violating 15 U.S.C. §1, commonly referred to as Section 1 of the Sherman Act, and to obtain mandatory injunctive relief designed to remedy the damage to the property, health, safety, comfort and welfare of the Plaintiff States and their citizens caused by defendants.

3. There is no other suitable forum than the original jurisdiction of the United States Supreme Court in which all Plaintiff States can bring this single action and obtain adequate and timely relief as sought herein or to which this action might be remitted in the interests of convenience, efficiency and justice.

Plaintiffs

4. Each of the herein Plaintiffs is a sovereign state of the United States and has sustained damages as a result of the combination and conspiracy in violation of the antitrust laws herein alleged.

5. Plaintiffs bring this action in their capacity as *parens patriae*, trustee, guardian, quasi-sovereign, representative and protector of the people of their respective states, and as proprietor of state lands, properties, and resources in that they have an obligation to maintain, promote and protect the health and welfare of their respective citizens and the integrity of their domain.

6. The wrong done to the people of the respective states named herein as Plaintiffs as a result of the combination and conspiracy alleged transcends the injury sustained by them individually, and adversely affects the economy and

prosperity of the Plaintiff States and the health and welfare of their citizens.

Defendants

7. Automobile Manufacturers Association, Inc., a corporation organized and existing under the laws of the State of New York with its principal place of business in Detroit, Michigan, is made a defendant herein. Automobile Manufacturers Association, Inc. is a trade association whose membership consists mainly of firms engaged in the business of manufacturing and selling motor vehicles and component parts and accessories thereto in various states of the United States.

8. The corporations named below are made defendants herein. Each of said corporations is organized and exists under the laws of the state indicated and has its principal place of business in the city indicated. Within the period of time covered by this complaint said defendants have primarily engaged in the business of manufacturing and selling motor vehicles in various states of the United States, and also manufacture and sell component parts and accessories thereto.

Defendant Corporation	*State of Incorporation*	*Principal Place of Business*
General Motors Corporation	Delaware	Detroit, Michigan
Ford Motor Company	Delaware	Dearborn, Michigan
Chrysler Corporation	Delaware	Highland Park, Mich.
American Motors Corporation	Maryland	Detroit, Michigan

9. Whenever in this complaint reference is made to any act, deed or transaction of a corporate defendant, such

allegation shall be deemed to mean that said corporation engaged in said act, deed or transaction by or through its officers, directors, agents or employees while they were actively engaged in the management, direction or control of corporate business affairs.

Co-Conspirators

10. Various other persons, firms and corporations not made defendants herein have participated as co-conspirators with the defendants in the offense charged in this complaint and have performed acts and made statements in furtherance thereof.

Definition

11. As used herein, the term "motor vehicle air pollution control equipment" means equipment, or any part thereof, designed for installation on a motor vehicle or any system or engine modification on a motor vehicle which is designed to cause a reduction of pollutants emitted from the vehicle, including, but not limited to, any device for the control of emissions of pollutants from the exhaust system, the crankcase, the carburetor, or the fuel tank.

Trade and Commerce

12. Automobiles for the most part are manufactured in the State of Michigan and are shipped therefrom to each of the fifty states of the United States. Some automobiles are assembled in various states of the United States from parts manufactured in the State of Michigan and other states. In 1966, 78,315,000 passenger cars and 15,864,000 trucks and buses, exclusive of off-the-road vehicles, were registered in the United States. In that year, 8,604,712

passenger cars valued at more than $17.5 billion and 1,791,-587 commercial vehicles valued at more than $3.9 billion were produced in this country. Of the trucks produced, 96,560 were built with diesel motors.

13. Since at least 1952, it has been established that motor vehicles contribute to air pollution by the emission of hydrocarbons, carbon monoxide, oxides of nitrogen and other contaminates.

14. As a result of new and continuing demands that automotive vehicles be equipped with air pollution control devices, a large and growing market for the production and installation of such devices has developed. Motor vehicle air pollution control devices are shipped in interstate commerce, both as original component equipment attached to motor vehicles and as replacements for existing components, from assembly points in various states to the Plaintiff States.

Violations Alleged

15. Beginning at least as early as 1953, and continuing thereafter up to and including the date of this complaint, the defendants and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in motor vehicle air pollution control equipment.

16. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been and are:

(a) to eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and

(b) to eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment.

17. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) agreed that all industry efforts directed at the research, development, manufacture and installation of motor vehicle air pollution control equipment should be undertaken on a non-competitive basis;

(b) agreed to seek joint appraisal of patents and patent rights submitted to any of them by persons not parties to a cross-licensing agreement entered into on July 1, 1955, and amended and renewed periodically, and agreed to require "most-favored-purchaser" treatment of all parties to the cross-licensing agreement if any one were licensed by a person not a party to that agreement;

(c) agreed to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment;

(1) In 1961 the defendants agreed among themselves to delay installation of "positive crankcase ventilation" on vehicles for sale outside of California until the model year 1963, despite the fact that this antipollution device could have been installed nationally for the model year 1962 and that at least some automobile manufacturers expressed willingness to do so, in the absence of a contrary industry-wide agreement;

(2) In late 1962 and extending into 1963, the defendants agreed among themselves to delay installation of an improvement to the positive crank-

case ventilation device, an improvement which the California Motor Vehicle Pollution Control Board had indicated it would make mandatory; and

(d) agreed to restrict publicity relating to research and development efforts concerning the motor vehicle air pollution problem.

Effects of Conspiracy

18. The aforesaid combination and conspiracy has had, among other, the following effects:

(a) Hindrance and delay in the research, development, and manufacture—both by the defendants and co-conspirators and by others not parties to the agreements alleged herein—and the installation of motor vehicle air pollution control equipment; and

(b) Restriction and suppression of competition among the defendants and co-conspirators in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and

(c) Restriction and suppression of competition in the purchase of patents and patent rights covering motor vehicle air pollution control equipment.

(d) The level of pollutants emitted into the ambient air by automobiles manufactured following the inception of the conspiracy was, and is, substantially greater than the level which would have been attained but for the aforementioned agreement, combination and conspiracy with the result that the citizens of the Plaintiff States live in an unhealthy environment contaminated by humanly injurious atmospheric pollutants that have inflicted and continue to inflict upon very large numbers of such citizens great physical suffering, and actual physical injury induced or aggravated by such automotive pollutants.

(e) The people of the Plaintiff States have been compelled to expend large but undeterminable sums of monies, in order to control the damaging effects of said air pollution which has caused substantial and

permanent damage to both real and personal property of the Plaintiff States and its citizens.

(f) The aforementioned hindrance and delays due to the restriction and suppression of competition in the research, development, manufacture and installation of pollution control devices have resulted in the continuous introduction of inadequate air pollution control devices as original and replacement equipment on motor vehicles purchased and used within the boundaries of the Plaintiff States and throughout the United States, despite the existence of technical capacity and knowledge sufficient to develop and produce effective air pollution control devices.

(g) The Plaintiff States and the people thereof have been compelled to expend large sums of monies for the purpose of curtailing the effects of pollution and for enforcement of anti-pollution control statutes and ordinances.

(h) All, or substantially all, of the people of the Plaintiff States have been harmed by the defendants as a result of the conspiracy herein described in that they have been subjected to live in an unhealthy environment contaminated by unnatural astmospheric pollutants emitted by motor vehicles manufactured by the defendants.

(i) The full and complete utilization of the wealth of the States has been adversely affected.

(j) Measures taken by the Plaintiff States to promote the general progress and welfare of its people have been frustrated.

(k) Injury and financial damage to the economy and prosperity of the Plaintiff States in, among others, the following ways:

(1) The natural resources of the Plaintiff States including, among others, plant life such as agronomic, forest, watershed and ornamental varieties have been and continue to be significantly damaged, injured and depleted, causing great damage to the ecology of the Plaintiff States.

(2) The citizens of the Plaintiff States have been compelled to live in an unhealthy environment contaminated by humanly injurious atmospheric pollutants that have caused and continue to cause serious, cumulative and permanent impairment to the general health, comfort and welfare of such citizens, to the detriment of the economy and prosperity of the Plaintiff States.

(3) The quality of the air within the States has been and continues to be significantly deteriorated to the detriment of the general economy and prosperity.

(1) The harm and damage done to the Plaintiff States and to their individual citizens cannot be accurately measured or adequately compensated in monetary terms, nor is there any practicable way in which the Plaintiff States could determine the individual money damages suffered by each of their citizens as a result of the above alleged acts of the defendants. Accordingly, Plaintiff States have no adequate remedy at law through a suit for treble damages. The only adequate remedy available to Plaintiff States and to their citizens is through the granting of injunctive relief as prayed for in this complaint.

Fraudulent Concealment

19. Plaintiffs had no knowledge of the aforesaid combination and conspiracy, or of any fact which might have led to the discovery thereof prior to the instituting of proceedings by the United States of America against the defendants herein on January 10, 1969. Plaintiffs could not have discovered the alleged combination and conspiracy at an earlier date by the exercise of due diligence since the combination and conspiracy set forth herein had been fraudulently concealed by defendants by various means and methods used to avoid the detection thereof.

20. By virtue of this fraudulent concealment, Plaintiffs

assert the tolling of any applicable statute or period of limitation affecting Plaintiffs' right of action herein.

COUNT II
COMMON LAW CONSPIRACY

1. Plaintiffs reallege paragraph 1 of Count I as paragraph 1 of this Count.

2. This Count is brought under this Court's general equitable powers granted by Article III, Section 2, of the United States Constitution, independent of the Sherman and Clayton Acts, to eliminate and remedy conspiracies in restraint of trade by the defendants, as recognized at common law, and to obtain mandatory injunctive relief designed to remedy the damage to the property, health, safety, comfort and welfare of the Plaintiff States and their citizens caused by the defendants.

3. There is no other suitable forum than the original jurisdiction of the United States Supreme Court in which all Plaintiff States can bring this single action and obtain adequate and timely relief as sought herein or to which this action might be remitted in the interests of convenience, efficiency and justice.

4. Each of the herein Plaintiffs is a sovereign state of the United States and has sustained damages as a result of the combination and conspiracy in restraint of trade prohibited by the common law as herein alleged.

5. Plaintiffs reallege paragraphs 5 through 20 of Count I as paragraphs 5 through 20 of this Count.

COUNT III

PUBLIC NUISANCE

1-2. Plaintiffs reallege paragraphs 1 and 3 of Count I as paragraphs 1 and 2 of this Count.

Plaintiffs

3. Each of the Plaintiff States brings this action in their quasi-sovereign capacity as proprietor of state lands, properties and resources, and as *parens patriae* to assert a claim independent of and beyond the interests of their individual citizens; each of the Plaintiff States has sovereignty within its borders and as such has dominion over all resources including the air that lies within their domain; concurrent with this power Plaintiff States have an obligation to take such action as may become necessary to assure the protection of such resources, including the air, the contamination of which would interfere with the rights of their respective citizens to live in and enjoy a healthy pollution-free environment.

Defendants

4-5. Plaintiffs reallege paragraphs 8 and 9 of Count I as paragraphs 4 and 5 of this Count.

Offense Charged

6. Motor vehicles manufactured by the defendants have in the past been and presently are so designed that noxious wastes and gases are released into the atmosphere in the course of ordinary operation of said motor vehicles.

7. Motor vehicles manufactured by the defendants and operated on the highways of the United States are responsible for the emission into the atmosphere of the fol-

lowing contaminants: carbon monoxide, oxides of nitrogen, hydro-carbons, lead compounds and other toxic particles.

8. The emissions of contaminants as described above pollute the air and thereby constitute a danger to human health and welfare, in that a direct relationship has been established between the contaminants contained in motor vehicle emissions and chronic respiratory disease, carcinogens, liver and kidney disorders, and a wide variety of tumors.

9. Contaminants emitted by vehicles such as are manufactured by the defendants directly cause severe damage to the flora and fauna of Plaintiff States.

10. The aforesaid emissions which pollute the air as described above have resulted from the design and engineering of the motor vehicles manufactured by defendants and which said defendants have caused to be distributed throughout the United States.

11. The continued manufacture and distribution of motor vehicles as presently engineered and designed which cause the aforesaid unhealthy and dangerous emissions constitute a public nuisance contrary to the public policy of the Plaintiff States, as well as the federal government. 42 U.S.C., §1857(4)(8)

12. The aforesaid injurious, unhealthy and dangerous discharges and emissions are continuing and remain unabated thereby causing irreparable and indeterminate damages to the Plaintiff States and their citizens; thus, the only adequate remedies available to the people of the Plaintiff States for the protection of their health, safety and welfare are those remedies solely existing in a court of equity.

13. There is presently existing or being developed adequate technology to alleviate or avoid the dangers alleged herein.

Prayer for Relief in Respect to All Courts

WHEREFORE, plaintiffs pray:

1. That the Court adjudge and decree that the aforesaid combination and conspiracy, and the acts done in pursuance thereof, were and are in unlawful restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act and in violation of the common law and that the acts alleged in Count III constitute a public nuisance;

2. That a mandatory injunction be issued by this Court requiring the defendants and each of them to adopt and pursue an accelerated program of spending, research and development designed to produce a fully effective pollution control device or devices and/or pollution free engine at the earliest feasible date as shown by the evidence, specifically, if applicable on the evidence, that date by which such device or devices or such pollution free engine would have been developed but for the conspiracy alleged herein;

3. That a mandatory injunction be issued by this Court requiring the defendants to cause to be installed, at defendants' expense, as standard equipment in all new motor vehicles sold, or delivered in the United States such effective anti-pollution control devices as could have been installed in said motor vehicles but for the conspiracy alleged herein;

4. That a mandatory injunction be issued by this Court

requiring the defendants to cause to be installed, at defendants' expense such effective anti-pollution control devices, as the Court deems reasonable and proper, on all motor vehicles owned or possessed by anyone in the United States, manufactured by the defendants during or following the period of the conspiracy alleged herein;

5. That the defendants be enjoined from continuing the combination and conspiracy and nuisance herein alleged, and from entering into any combination, conspiracy, agreement, understanding or concert of action having similar purposes or effects;

6. That the Plaintiffs have such other, further and different relief as the nature of the case may require or to the Court shall seem justified; and

7. That the Plaintiffs respectively recover from the defendants the cost of this suit, together with reasonable attorneys fees as is provided in the federal antitrust laws.

DATED: August 5, 1970.

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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SUBJECT INDEX

	Page
Statement of Grounds on Which Original Jurisdiction is Invoked	1
Question Presented	2
Statement of the Case	3
Argument	5
I. Plaintiff States Have a Right to Sue as *Parens Patriae Quasi* Sovereigns and Proprietors	5
II. The Original Jurisdiction of This Court Should Be Exercised in This Case	9
III. There Is No Other Suitable Forum in the Interest of Convenience, Efficiency and Justice	10
A. The Injunctive Relief Sought by Plaintiff States Is the Most Adequate and May be the Only Remedy for the Loss and Damage Done to Plaintiff States by the Wrongs Alleged	11
1. Right to relief under Count I	12
2. Right to relief under Count II	14
3. Right to relief under Count III	15
B. This Is the Only Forum Which Can Provide a Single Unified Trial, With a Nationwide Injunction	19
C. Time Is Essential to the Relief Sought	20
D. In Exercise of Its Original Jurisdiction, This Court Has Broad Powers to Expedite and Simplify the Action and to Coordinate Discovery With the Multi-district Cases Now Pending	22
E. Defendents Should Join With Plaintiffs in Urging This Court to Exercise Original Jurisdiction	24
Conclusion	25

Page

Appendices:

Appendix A—Consent Decree A-1

Appendix B—Excerpts From Transcript A-11

Appendix C—The Judicial Panel on Multidistrict Litigation A-13

TABLES OF AUTHORITY

Table of Cases

Arctic Maid v. Territory of Alaska, 297 F.2d 28 (9th Cir., 1961) 16

Beacon Theatres v. Westover, 359 U.S. 500 (1959) 14

DeKoven v. Lake Shore & M. S. Ry. Co., 216 Fed. 955 (S.D.N.Y., 1914) 15

Florida v. Mellon, 273 U.S. 12 (1927) 10

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) 5, 7, 8, 9, 10, 25

Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) 6-7, 10, 15

Guiterman v. Pennsylvania R. Co., 48 F.2d 851 (E.D. N.Y., 1931) 15

Hess v. Pawloski, 274 U.S. 352 (1927) 20

Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) 24

Krisel v. Duran, 386 F.2d 179 (2d Cir., 1967), *cert. denied*, 390 U.S. 1042 (1968) 16

Massachusetts v. Mellon, 262 U.S. 447 (1923) 10

Missouri v. Illinois & Chicago District, 180 U.S. 208 (1901) 5, 6, 7, 9

Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960) 14

Near v. Minnesota, 283 U.S. 697 (1931) 14

Oklahoma v. Cook, 304 U.S. 387 (1938) 8

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 17

Page

Reich v. Webb, 366 F.2d 153 (9th Cir., 1964) 15

United States v. Paramount Pictures, 334 U.S. 131 (1948) 14

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) 10

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 13-14

Constitutional Provisions

United States Constitution, Article III,§ 2.....1, 2, 9, 14, 25

Statutes

Clayton Act, Section 16 (15 U.S.C. §26) 3, 7, 12, 13, 14, 15

Sherman Act, Section 1 (15 U.S.C. §1) 3

28 U.S.C §1251 (b) 9

§1251 (b) (3) 1, 2, 25

§1407 19

Textbooks

78 Harv. L. Rev. 994 (1965) 14

Other Authority

BNA Anti-Trust and Trade Regulation Report No. 427 at A-11, Sept. 16, 1969 18

Federal Rules of Civil Procedure, Rule 53 23

Supreme Court Rule 9 22

U.S. Department of Health, Education and Welfare, Public Health Service Report (1969) 21-22

Public Health Service Report (1970) 21

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF GROUNDS ON WHICH ORIGINAL JURISDICTION IS INVOKED

The original jurisdiction of this court is invoked under Article III, §2 of the United States Constitution and 28 U.S.C. §1251 (b)(3) as an original action by the States

of ARIZONA, COLORADO, HAWAII, ILLINOIS, IOWA, KANSAS, MAINE, MASSACHUSETTS, MINNESOTA, MISSOURI, OHIO, RHODE ISLAND, VERMONT, VIRGINIA and WASHINGTON, against the defendants GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, AMERICAN MOTORS CORPORATION and AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., who are all citizens of a State or States different from those States bringing this action as plaintiffs.

Article III, §2 of the United States Constitution states as follows:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—*between a State and Citizens of another State*;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. (Emphasis added)

28 U.S.C. §1251(b)(3) states as follows:

> (b) The Supreme Court shall have original but not exclusive jurisdiction of:
>
> (3) All actions or proceedings by a State against the citizens of another State or against aliens. June 25, 1948, c. 646, 62 Stat. 927.

QUESTION PRESENTED

Should the Supreme Court exercise its original jurisdiction in this case where 15 States, representing 65,900,000[1]

1. Based on 1970 preliminary census figures.

people or over 30% of the total population of the United States, have sued as *parens patriae*, Quasi Sovereigns, and Proprietors, seeking equitable relief against citizens of another State and where there is no other suitable forum in which this case can be tried in the interest of all parties hereto and in the interests of convenience, efficiency and justice?

STATEMENT OF THE CASE

The Plaintiff States as *parens patriae* of their citizens as *quasi* sovereigns, and as proprietors seek injunctive relief including mandatory injunctions on three separate counts. Count I asserts violations of the federal antitrust laws, specifically Section 1 of the Sherman Act, 15 U.S.C. §1, alleging that defendants have conspired, combined and agreed in restraint of trade, to delay and prevent the research, development and installation of effective air pollution control devices for automobiles manufactured and sold by the defendants to the American public. In respect to Count I, Plaintiff States seek injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. §26.

Count II asserts a conspiracy in restraint of trade at common law, alleging as in Count I that defendants have combined, conspired and agreed to delay and prevent the research, development and installation of effective air pollution control devices for automobiles manufactured by them. In respect to Count II, Plaintiff States as *parens patriae* of their citizens request this Court to grant injunctive relief in exercise of its general equity powers, asserting that such States have no remedy at law adequate to protect the health, safety and welfare of their citizens.

Count III asserts that the defendants jointly and severally have caused and maintained a public nuisance in

that said defendants, and each of them, have manufactured and sold automobiles to the American public, which automobiles have in the past and do now discharge harmful pollutants into the air in and over the Plaintiff States, thereby causing irreparable injury and damage to the health, welfare, safety and property of said States and their citizens. In respect to Count III, Plaintiff States, as *parens patriae* of their citizens and as *quasi* sovereigns, request this court to grant such injunctive relief as this Court deems appropriate in the exercise of its general equity powers.

The States which are Plaintiffs in this action represent a total population of 65,900,000 citizens, or over 30 per cent of the population of the United States. Plaintiff States are situated in every geographic region of the United States. Automobiles manufactured and sold by the defendants in every State (including all States not plaintiffs herein) are driven in and through Plaintiff States or emit pollutants which contaminate the air over Plaintiff States. In view of the national scope of the injury alleged in this complaint, the national scope of the conspiracy asserted in Counts I and II, the national magnitude of the nuisance asserted in Count III, and the inadequacy of any injunctive relief which is less than nationwide in its impact and effect, Plaintiff States seek leave to file this action in this Court. Plaintiff States submit that this forum, in the interests of convenience, efficiency and justice, can provide the only unified trial of the facts alleged as well as grant the nationwide injunctive relief requested in the event that Plaintiff States prevail.

In addition, in view of the injunctive relief sought by

Plaintiffs, as spelled out more particularly below, a speedy *final*[2] adjudication is absolutely essential in order to remedy the substantial loss and damage and the irreparable injury caused by the wrongful acts of defendants alleged herein.

Relief delayed as a result of following the normal appellate processes may well be relief denied.

ARGUMENT

I.

Plaintiff States Have a Right to Sue as *Parens Patriae*, Quasi Sovereigns and Proprietors

Each of the Plaintiff States brings this action as *parens patriae* on behalf of its citizens, as *quasi* sovereign of its interests in the air within its domain, and as proprietor of its lands and property, all of which have been damaged by the acts of the defendants alleged in the complaint. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945). The impact of air pollution from automobile emissions upon the health and welfare of the citizens of the several States and its impact upon interests of the States themselves are well known facts which have been pleaded with specificity in the complaint and which Plaintiffs will prove at the trial.

That such an action may be maintained by a State on behalf of her citizens is beyond serious dispute. In the original action of *Missouri v. Illinois & Chicago District*, 180 U.S. 208 (1901), this Court was faced with the contention that the State of Missouri was not the proper party to seek an injunction restraining the Chicago Sanitation

2. By "final," we mean all further remedies by way of appeal have been exhausted.

District from discharging sewerage into waters that flowed into the Mississippi River upon which Missouri residents relied for consumption purposes. At 180 U.S. 241, this Court responded as follows:

> It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, *if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.* . . . . (Emphasis added)

In the original action of *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), an action, like Count III of the instant suit, to enjoin a nuisance, this Court recognized that a State retains *quasi* sovereign interests, independent of and beyond the interest of her citizens, which justifies the maintenance of an action to abate the discharge of noxious gases over her territory from operations conducted in an adjoining State. In delivering the Court's opinion, Justice Holmes said at 206 U.S. 237:

> The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

Again at 206 U.S. 238:

> It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threat-

> ened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.

The Court also noted that the evidence showed that the State of Georgia had made out a case within the *parens patriae* requirements of *Missouri v. Illinois & Chicago District, supra.*

In a more recent original action, *Georgia v. Pennsylvania R. Co., supra,* this Court held that its original jurisdiction could be invoked by a State suing citizens of another State in either her *parens patriae* or *quasi* sovereign capacity.

In that case the State of Georgia brought an original action under the Clayton Act for injunctive relief and damages against twenty railroads alleged to have conspired in fixing freight rates that discriminated against Georgia. The action was brought in four capacities by the State.

1. *Parens patriae* for the citizens of Georgia;
2. *Quasi* sovereign;
3. Proprietary;
4. As a "person" entitled to sue for injunctive relief under §16 of the Clayton Act.

This Court held that Georgia was entitled to maintain the action in all four capacities. In passing upon the question of whether civil remedies under the antitrust laws

could be sought by Georgia in its *parens patriae* capacity, it was said at 324 U.S. 447:

> The enforcement of the criminal sanctions of these acts has been entrusted exclusively to the federal government. See *Georgia v. Evans, supra,* [316 U.S. 159], p. 162. But when it came to other sanctions Congress followed a different course and authorized civil suits not only by the United States but by other persons as well. And we find no indication that, when Congress fashioned those civil remedies, it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae,* have long been recognized. *There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.* (Emphasis added)

And at 324 U.S. 450:

> It seems to us clear that under the authority of these cases Georgia may maintain this suit as *parens patriae* acting on behalf of her citizens . . . .

In *Georgia v. Pennsylvania R. Co., supra,* this Court treated the "*quasi*-sovereign" interests of a State as, similar to, if not synonymous with the interests of a State as *parens patriae* of her citizens' welfare, and distinguished those kinds of interests from the proprietary interests of a State which might justify an action solely on the basis of injury to State property or institutions. In the *Pennsylvania R. Co.* case, this Court held that Georgia's action was properly maintainable in either capacity under the original jurisdiction of this Court for civil relief under the federal antitrust laws.

In all three capacities in which they sue, it is clear that Plaintiff States are the proper parties to bring this action, and that they are the real parties in interest. This is not an action like *Oklahoma v. Cook,* 304 U.S. 387 (1938), where

the Plaintiff States are seeking to invoke the original jurisdiction of this Court primarily for the benefit of particular individuals. The relief requested in this action can only be obtained in an action of this type, and is sought for the benefit of all citizens of the several Plaintiff States. In this respect, the present case is similar to *Missouri v. Illinois & Chicago District, supra,* wherein this Court responded to the argument that private citizens were the proper parties to seek relief from pollution of the Mississippi River, by stating at 180 U.S. 241:

> That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument.

The same argument was rejected in *Georgia v. Pennsylvania R. Co., supra,* at page 452:

> This is not a suit in which a State is a mere nominal plaintiff, individual shippers being the real complainants. This is a suit in which Georgia asserts claims arising out of federal laws and the gravamen of which runs far beyond the claim of damage to individual shippers.

II.

The Original Jurisdiction of This Court Should Be Exercised in This Case

> The original jurisdiction of this Court is one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes . . . between a State and citizens of another State. *Georgia v. Penn. R. Co.,* 324 U.S. at 450.

The original jurisdiction of this Court in this case is based on Article III, §2 of the United States Constitution and 28 U.S.C. §1251(b).

The complaint presents a justiciable controversy that is not of a political or governmental character. Cf. *Massachusetts v. Mellon*, 262 U.S. 447 (1923), and is, in any event, justiciable as a suit by States against citizens of another State, *Georgia v. Tennessee Copper Co.*, *supra*. Likewise, this action does not involve enforcement of the penal statutes of a State, *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888), nor seek to protect State citizens from the operation of federal laws. *Florida v. Mellon*, 273 U.S. 12 (1927).

Since this is an action by States against citizens of other States, the original jurisdiction of this Court is not exclusive. *Georgia v. Pennsylvania R. Co.*, 324 U.S. at 464.

This Court should, however, exercise its original jurisdiction in this case upon a showing by plaintiffs that there is not "another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." 324 U.S. at 464-65.

III.

There Is No Other Suitable Forum in the Interests of Convenience, Efficiency and Justice

In *Georgia v. Pennsylvania R. Co.*, *supra*, *this* Court said at 464:

> The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency, and justice.

There are three decisive factors in this case which make this forum the most convenient forum, the most efficient forum, and the forum most able to do justice in the interests of both Plaintiff States and the defendants in resolving the

unprecedented questions presented by this suit.

1. Only this forum can provide a single unified trial of the issues relating to the conspiracies (Counts I and II) and the public nuisance (Count III) alleged, resulting if successful in uniform nationwide injunctive relief.

2. This forum can provide the most expeditious final determination of the questions of fact presented and the appropriateness of the injunctive relief sought, a final determination which if delayed even by the normal appellate processes may become at worst moot, and at best more costly, both to the public and to the defendants.

3. No other federal forum has jurisdiction over Count III since a State is not a citizen for diversity purposes, and Count III does not present a federal question.

A. *The Injunctive Relief Sought by Plaintiff States Is the Most Adequate and May Be the Only Remedy for the Loss and Damage Done to Plaintiff States by the Wrongs Alleged.*

The crux of the relief sought by the Plaintiff States is set forth in the following paragraphs of the Prayer for Relief:

"2. That a mandatory injunction be issued by this Court requiring the defendants and each of them to adopt and pursue an accelerated program of spending, research and development designed to produce a fully effective pollution control device or devices and/or a pollution free engine at the earliest feasible date as shown by the evidence, specifically, if applicable on the evidence, that date by which such device or devices or such pollution free engine would have been developed but for the conspiracy alleged herein;

"3. That a mandatory injunction be issued by this Court requiring the defendants to cause to be installed, at defendants' expense, as standard equipment in all new motor vehicles sold, or delivered in the United States such effective anti-pollution control devices as could have been installed in said motor vehicles but for the conspiracy alleged herein;

"4. That a mandatory injunction be issued by this Court requiring the defendants to cause to be installed, at defendants' expense such effective anti-pollution control devices as the Court deems reasonable and proper, on all motor vehicles owned or possessed by anyone in the United States, manufactured by the defendants during or following the period of the conspiracy alleged herein."

If Plaintiff States can prove the facts alleged in their complaint, they have a right to the relief requested under each of the three counts of their complaint.

1. Right to relief under Count I

The prayer for relief under Count I, the Sherman Act Count, is sought pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26 which states in part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

Plaintiff States allege loss and damage, which is not only threatened but which is in fact presently occurring as a

result of the wrongful acts of the defendants alleged in the complaint. It is plain from the statutory language of Section 16 of the Clayton Act that injunctive relief is available against "threatened loss or damage" resulting from conduct in violation of the antitrust laws, without regard to whether or not the active conduct is still continuing. If Congress had intended to limit injunctive relief to threatened *conduct,* it would have used words to the effect of "threatened loss or damage by a *threatened* violation of the antitrust laws." By specifically stating that injunctions are available on the same equitable principles *as* injunctions against threatened conduct, and by omitting any language such as that suggested here, the meaning is plain—the principles for issuing injunctions are those principles for issuing injunctions against threatened conduct, but Section 16 injunctions are available to remedy more than threatened conduct, and threatened conduct is not a necessary prerequisite to Section 16 injunctive relief.

While no interpretative principle is necessary to reach this conclusion, it is fortified by this Court's analysis in *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-31, (1969), that, in addition to affording private relief, Clayton Act, Section 16, was designed to serve "the high purpose of enforcing the antitrust laws." This court said:

> Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles,* 321 U.S. 321, 329-330, 64 S. Ct. 587, 592, 88 L.Ed. 754 (1944). Its availability

should be "conditioned by the necessities of the public interest which Congress has sought to protect." *Id.*, at 330, 64 S. Ct., at 592.

The principles upon which injunctions are granted by courts of equity "against threatened conduct that will cause loss or damage," are essentially the traditional equitable principles of (1) difficulty in ascertaining damages, (2) multiplicity of suits and (3) absence of realistic damage relief. See generally, Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1001-04 (1965). Countervailing principles include circumvention of a jury trial, *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), impositions imposed on individual freedoms, *Near v. Minnesota*, 283 U.S. 697 (1931), and difficulties in enforcing a decree, *United States v. Paramount Pictures*, 334 U.S. 131, 161-66 (1948).

2. Right to relief under Count II

Plaintiff States alleging a common law conspiracy seek the same relief under Count II, as is sought under Count I. Without admitting that any limitations or restrictions are imposed on the general equity powers of a court by Section 16 of the Clayton Act, if this Court nevertheless concludes that there are such limitations under Section 16 of the Clayton Act, this Court may invoke its general equity powers and grant such relief upon proof of the common law conspiracy alleged.

Since the Clayton Act, Section 16, does not expressly limit the equitable powers of the federal courts, it must be assumed that the full grant of those powers by United States Constitution, Article III, §2 is reserved. Cf. *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291-92 (1960);

Reich v. Webb, 366 F.2d 153, 158-59 (9th Cir. 1964). Plaintiffs may thus invoke this Court's general equity powers independent of Clayton Act, Section 16. See generally, *Guiterman v. Pennsylvania R. Co.*, 48 F.2d 851 (E. D. N.Y. 1931); *DeKoven v. Lake Shore & M. S. Ry. Co.*, 216 Fed. 955 (S.D.N.Y. 1914).

3. Right to relief under Count III

In respect to Count III, as in respect to Count II, Plaintiff States invoke the general equity powers of this Court to shape and frame decrees which will afford adequate and complete relief. The power which Plaintiffs ask this Court to exercise under Count III is the same power employed in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), where this Court accepted jurisdiction of an original action by Georgia to abate an air pollution nuisance caused by a citizen of another state. As Justice Holmes said in that decision:

> [The state of Georgia] has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. 206 U.S. at 237.

In its *quasi*-sovereign capacity, the Court stated that Georgia had a right to maintain an action on behalf of its citizens to protect the earth and air within its boundaries. On the question of jurisdiction, this Court said at 206 U.S. 237:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests; *and the alternative to force is a suit in this court.* (Emphasis added)

The Court went on to explain that it was guided by the

same equitable principles as in an action between private parties. Justices Holmes and Harlan debated the extent of that equitable power in an original action where a state was plaintiff, but the injunction was issued, all justices concurred in that issuance, and there was no dispute that this Court had the authority to do so. Under Count III, Plaintiffs ask no more than this.

This is the only Federal Court which can adjudicate Count III. A suit between a state and citizens of another state does not involve diversity of citizenship, because a state is not a citizen for diversity purpose. *Arctic Maid v. Territory of Alaska,* 297 F.2d 28 (9th Cir. 1961); *Krisel v. Duran,* 386 F.2d 179 (2d Cir. 1967), *cert. denied,* 390 U.S. 1042 (1968). Since Count III does not involve a federal question for purposes of giving jurisdiction to any federal district court, the only federal forum available for Count III is this Court under its original jurisdiction.

The equitable and possibly the only adequate relief which Plaintiff States seek herein is the most adequate remedy by which a court can redress the damage and loss inflicted upon the health, welfare and safety of the citizens of the Plaintiff States, and the natural resource of air over which the Plaintiff States exercise dominion.

In view of the considerable difficulty involved in measuring and computing the damage done to the health and safety of the citizens of Plaintiff States, on behalf of whom these States sue as *parens patriae,* and the difficulty of translating such damage into monetary terms, the equitable relief sought by the Plaintiff States in this case is more adequate, more appropriate, and more just (at least at this stage of the proceedings) than monetary damages.

As stated, the Plaintiff States bring this action not as "mere volunteers attempting to vindicate the freedom of interstate commerce or to redress purely private grievances," but as representatives of the public in respect to "a matter of grave public concern in which the State, *as the representative of the public*, has an interest apart from that of the individuals affected." (Emphasis added) *Pennsylvania v. West Virginia*, 262 U.S. 553 at 591-92 (1923).

In January 1969, the United States filed a civil action under the Sherman Act against the principal defendants named in the present action, based upon generally the same facts and allegations contained in Count I of the complaint of these Plaintiff States.

In September 1969, the Department of Justice filed a proposed consent decree[3] in its action, signed by the defendants, which decree was approved by the District Court Judge. The consent decree did not constitute an admission by any defendant of violating the Sherman Act—its principal effect was to restrain the defendants from conspiring to delay the development and installation of pollution control devices for automobiles, if such a conspiracy had ever existed.

That the federal antitrust action was settled by consent decree in no way diminishes or abridges the duty of the Plaintiff States in the interest of their citizens and their sovereignties to pursue the relief sought in this complaint. Moreover, the consent decree itself is in no way inconsistent with the relief sought by this action.

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3. A copy of the consent decree entered in the Department of Justice action is attached to this brief as Appendix A.

United States Attorney General John N. Mitchell announced when the consent decree was proposed, that a continuation of the Government's suit (a) might take 10 years of litigation, and (b) would have delayed the Justice Department's efforts to end the alleged conspiracy and its efforts to encourage immediate action by the automobile companies. *BNA Anti-Trust and Trade Regulation Report* No. 427 at A-11, Sept. 16, 1969. It is clear from the consent decree and from the Attorney General's explanation of that decree that the Department of Justice concluded that the most important thing for it to accomplish was an agreement with the individual defendants, that each of them would proceed competively and on its own to develop effective pollution control devices by consenting, without admitting to it, not to agree to develop such devices, if at all, in concert. Such an agreement with the defendants was obviously the first order of business in the public interest and it was accomplished by the U.S. Government expeditiously by consent decree, without a long trial.

That having been accomplished, however, it does not follow that the loss or damage, threatened, caused and continuing to be caused by the defendants' conspiracy, has been abated, or that a fully adequate remedy has been provided. The Plaintiff States through their own action herein, seek injunctive equitable relief which will extend the initial beneficial results obtained by the consent decree to the second order of business, namely, the elimination insofar as possible of the damage which continues to be done to the Plaintiff States by the actions of the defendants alleged in the complaint.

B. *This Is the Only Forum Which Can Provide a Single Unified Trial, With a Nationwide Injunction.*

The conspiracy alleged by the complaint herein is one which has nationwide effect. If the fifteen Plaintiff States were to bring fifteen separate actions, each in their own district, as several other States and a multiplicity of municipalities and individuals have already done, these cases would be consolidated for discovery and pretrial proceedings under 28 U.S.C. §1407. However, that statute expressly provides "each action so transferred *shall* be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred, unless it shall have been previously terminated." 28 U.S.C. §1407 (Emphasis added)

Yet, the very nature of this case brought by fifteen separate and sovereign States alleging one conspiracy, and seeking one nationwide injunction, strongly suggests that the only efficient way to handle this matter, in the interests of the entire judicial system, is by one trial.

To begin with, under present statutes and rules, there is no existing mechanism other than the exercise of this Court of its original jurisdiction, to provide a single unified trial of this case. Even if there were such a mechanism, this case brought by fifteen States is uniquely suited to the original jurisdiction of this Court. Lest this Court be concerned that by exercising original jurisdiction in this case it will be opening the door to a flood of similar multi-state cases, it is difficult to visualize cases likely to be similar to this action. First of all, this case concerns the automobile. There is little in this country as mobile, as national, as the car. It is not by coincidence that the automobile was at the vanguard of the expansion of personal

jurisdiction of state courts through what ultimately developed into the passage of long arm jurisdiction statutes. See *Hess v. Pawloski*, 274 U.S. 352 (1927). Secondly, it is doubtful that many cases can be visualized in which the need for speed in reaching a final adjudication is as crucial as in the instant case, to preserve the only adequate remedy which may be available. Third, if there are a number of similar potential cases in the offing in the future, then Congress can certainly fashion another judicial mechanism for handling such cases, in order to spare this Court the exercise of its original jurisdiction. The point is that as of now no such mechanism exists, or prior hereto has been needed.

Lest there be any doubt that Plaintiff States' argument in favor of a unified trial is merely a theoretical one, defendants have made it clear in the multi-district private civil damage antitrust litigation involving motor vehicle air pollution control equipment, Docket No. 31, that this case will not be settled; or to quote a barrister who practiced in another jurisdiction, and in a less complicated time, "This trial must be tried." Statements by defendants' counsel to that effect are set forth in Appendix B of this brief.

C. *Time Is Essential to the Relief Sought.*

Plaintiff States have previously shown that the multi-district mechanism established by Congress cannot furnish the single trial appropriate to this case in the interests of convenience, efficiency and justice. Equally so, it cannot furnish final adjudication of the injunctive relief sought as expeditiously as can the original jurisdiction of this Court.

As the multi-district panel itself has recognized, in consolidating the actions commenced by States, cities and individuals following the consent decree entered in the Government's case, "this litigation could quickly become the largest and most complicated multi-district litigation commenced since this Panel was established less than two years ago." *Opinion*, Multi-District Docket No. 31, April 6, 1970, page 3, attached hereto as Appendix C. It is apparent that this litigation—as a multi-district case making its way through the lower federal courts—would go on for years. A survey of cases selected at random in the Ninth Circuit over the last three years indicates that on the average between 18 months and 2 years is consumed following the final judgment at the district court level, until the case is finally adjudicated, assuming, which might not be the case here, that *certiorari* is denied by this Court.

Conversely, the need for a speedy remedy is equally apparent. On or about March 20, 1970 the U.S. Department of Health, Education and Welfare, Public Health Service, gave a detailed report to the U.S. Senate Air and Water Pollution Subcommittee on the effects of air pollution caused by automobile exhaust emissions. This report stated that 67.3 million tons of carbon monoxide are released into the atmosphere every year from automobile exhausts, and that this amount is increasing. It said that carbon monoxide levels have reached 115 ppm (parts per million) in downtown urban areas, 75 ppm on expressways, and 87 ppm in underground garages, tunnels and overpass buildings. According to the Public Health Service, concentrations of 10-15 ppm of carbon monoxide have been associated with adverse health effects.

In another report issued by the Public Health Service in

1969 entitled "Determining Air Pollutant Emissions from Transportation Systems," the following table is shown on page 2:

PERCENT OF NATIONWIDE EMISSIONS OF FIVE MAJOR POLLUTANTS PRODUCED BY MOTOR VEHICLES

Pollutants	*Total national emissions (millions of tons)*	*Motor vehicle emissions (millions of tons)*	*Percent of total emissions*
Carbon monoxide	86.8	67.3	77.5
Hydrocarbons	23.7	12.7	53.6
Nitrogen oxides	15.8	7.0	44.3
Particulates	14.8	0.7	4.7
Sulfur oxides	30.4	0.3	1.0

The increase in pollutant emissions by motor vehicles and the percentage of total emissions attributable to automobiles have likewise been reported by governmental and private scientists.

The serious air pollution now resulting from automobile emissions, with its consequent effect upon the health and welfare of American citizens, complicated by the addition of more automobiles and increased pollution into the atmosphere of the Plaintiff States and the rest of the nation, compels that a speedy remedy be provided for this dangerous, and even deadly, problem.

D. *In Exercise of Its Original Jurisdiction, This Court Has Broad Powers to Expedite and Simplify the Action and to Coordinate Discovery With the Multidistrict Cases Now Pending.*

Pursuant to U.S. Supreme Court Rule 9, this Court may

avail itself of the procedures described in Federal Rules of Civil Procedure, Rule 53, relating to the appointment of a master. There is nothing in the rules to prevent the Supreme Court from appointing more than one master—for example, it might appoint one master to supervise and handle all discovery and pretrial proceedings, but appoint a second master to handle the trial of the factual issues. In that respect, this Court would have power to appoint Judge Manuel L. Real, the United States Judge of the Federal District of California, to whom the multi-district private civil treble damage antitrust litigation involving air pollution control equipment was assigned by the Panel on multi-district litigation, as master in this case in respect to all pre-trial and discovery proceedings. Such an appointment would be one way in which this Court, while exercising its original jurisdiction in this case could assure the coordination of this action with the multi-district actions during the discovery phase. Such an appointment would at the same time not inhibit the expeditious handling of the final adjudication which the Plaintiff States seek, since the trial of the factual issues, whether conducted by Judge Real as a master or by some other master appointed by this Court, could proceed at the conclusion of discovery and be finally determined by this Court while the multi-district actions were returned to the districts in which they were filed for separate trials and separate appeals through the normal federal appellate procedures.

Plaintiff States do not suggest that the above-described course is the only or the best means of proceeding, but simply that it is one way of coordinating this proceeding

with the presently pending multi-district proceedings. Such an approach is consistent with the principle that in the exercise of its original jurisdiction the Supreme Court may regulate and mold the process it uses in such manner as in its judgment will best promote the purposes of justice. *Kentucky v. Dennison,* 65 U.S. (24 How.) 66 (1861).

E. *Defendants Should Join With Plaintiffs in Urging This Court to Exercise Original Jurisdiction.*

Plaintiff States believe that it is in the best interest of the defendants, as well as of the Plaintiff States and their citizens, that there be one trial of the factual issues of liability, and a speedy final adjudication of the equitable relief sought in this action.

Surely, a number of separate trials in diverse judicial districts in the United States with each district court shaping the equitable relief granted to the particular facts shown in the case tried by him, would be as confusing, as expensive, and as wasteful to the defendants as it would be to the public in general. Furthermore, if the evidence justifies the equitable relief sought by Plaintiff States, and if a court orders the defendants, or any of them, to undertake an accelerated program to produce effective pollution control devices, then the sooner the defendants know that they must follow such a program, the easier it will be for them. The defendants may well contend that the relief sought by Plaintiff States is totally inappropriate. As shown above, however, that determination cannot be finally made until the facts which might justify such relief

have been marshalled and presented to the Court. Assuming that this can be done, and that relief of the type sought by Plaintiff States will be granted, then the sooner defendants know what they must do, the better off they will be.

CONCLUSION

Under Article III, Section 2 of the United States Constitution and under 28 U.S.C. §1251(b)(3), this Court has original jurisdiction of this suit. It should exercise that jurisdiction under the guidelines enunciated in *Georgia v. Pennsylvania R. Co., supra,* for the reason that there is no alternative forum suitable for the trial of this action in the interests of efficiency, convenience and justice. This Court has the power to establish rules and to preside over this case in a way which will shorten the length of these proceedings by at least two years. It can provide in the interest of all the parties and the public one trial with one result, as contrasted with a number of trials, quite possibly producing varying results In respect to Count III, this Court is the only federal forum available to these Plaintiffs. This Court can, if Plaintiffs prevail, issue one injunction with nationwide effect.

This suit seeking nationwide equitable relief brought by 15 sovereign states representing more than 30% of the population of the entire nation is precisely the type of legal action which calls for the use of that mighty instrument provided by the framers of the Constitution for the peaceful settlement of disputes between states and citizens

of another state. This Court should exercise its original jurisdiction in this case.

Respectfully submitted,

Dated August 5, 1970

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APPENDIX A

Consent Decree

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC.;
GENERAL MOTORS CORPORATION;
FORD MOTOR COMPANY;
CHRYSLER CORPORATION; and
AMERCIAN MOTORS CORPORATION,
Defendants.

CURTIS, J.: The plaintiff, United States of America, having filed its complaint herein on January 10, 1969, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of or finding on any issues of fact or law herein and without this Final Judgment constituting evidence or an admission by any of them in respect to any such issue:

NOW, THEREFORE, before any testimony has been taken and without trial or adjudication of or finding on any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890,

entitled "An act to protect trade and commerce against unlawful restraints and monopolies, "commonly known as the Sherman Antitrust Act, as amended.

II.

As used in this Final Judgment:

(A) "Devices" means air pollution emission control designs, devices, equipment, methods, or parts thereof, for motor vehicles.

(B) "Restricted information" means all unpublished information of the type usually classified as company confidential concerning applied as distinguished from basic research in, or concerning the development, innovation, manufacture, use, sale or installation of Devices. It includes trade secrets, unpublished company policy, and other unpublished technical information for developing, making, improving, or lowering the cost of, Devices by a motor vehicle manufacturer. "Restricted information" shall not mean (i) information concerning basic research in gaining a fuller knowledge or understanding of the presence, nature, amount, causes, sources, effects or theories of control of motor vehicle emissions in the atmosphere, or (ii) information relating primarily to equipment, methods or procedures for the testing or measurement of Devices, or (iii) information for or resulting from the testing or measurement of production prototypes of Devices of an advanced stage exchanged solely for such purposes. Information shall be deemed to be published when it is disclosed without restriction to the public, or to media of general circulation, or to the trade press, or to meetings of stockholders, dealers, or financial analysts, or to meetings of professional, scientific or engineering societies,

or committees thereof, the membership of which is not limited to persons employed by defendants or by motor vehicle manufacturers, or to meetings called by representatives of Federal, state or local governments or agencies authorized to issue motor vehicle emission control regulations.

III.

The provisions of this Final Judgment shall be binding upon each defendant and upon each of its subsidiaries, officers, directors, agents, servants, employees, successors and assigns, and upon all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to any transaction between or among a parent company, its subsidiaries, officers, directors, agents, servants and/or employees. Nothing in this Final Judgment shall have any effect with respect to any activities outside the United States which do not adversely and substantially affect the foreign commerce of the United States.

IV.

(A) Each defendant is enjoined and restrained from:

(1) Combining or conspiring to prevent, restrain or limit the development, manufacture, installation, distribution or sale of Devices;

(2) Entering into, adhering to, enforcing or claiming any rights under any provisions of any agreement, arrangement, understanding, plan or program (hereinafter "agreement") with any other defendant or manufacturer of motor vehicles or Devices:

(a) to exchange restricted information;

(b) to cross-license patents or patent rights on Devices which cross-license includes patents or patent rights acquired subsequent to the date of any such-cross-license;

(c) to delay installation of Devices or otherwise restrain individual decisions as to installation dates;

(d) to restrict publicity of research and development relating to Devices;

(e) to employ joint assessment of the value of patents or patent rights of any third party relating to Devices;

(f) to require that acquisition of patent rights relating to Devices be conditioned upon availability of such rights to others upon a most-favored-purchaser basis;

(g) to file, in the absence of a written authorization for a joint statement by the agency involved, with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations, any joint statement regarding such standards or regulations except joint statements relating to (i) the authority of the agency involved, (ii) the draftsmanship of or the scientific need for standards or regulations, (iii) test procedures or test data relevant to standards or regulations, or (iv) the general engineering requirements of standards or regulations based upon publicly available information; provided that no joint statement shall be filed which discusses the ability of one or more defendants to comply with a particular standard or regulation or to do so by a particular time, in the absence of a written agency authorization for such a joint statement, and provided also that any defendant joining in a joint statement shall also

file a statement individually upon written request by the agency involved; or

(h) not to file individual statements with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations.

(B) Nothing in this Final Judgment shall prohibit any defendant:

(1) from furnishing or acquiring any restricted information for the defense or prosecution of any litigation or claim;

(2) from entering into or performing under any otherwise lawful agreement with any other person or conducting *bona fide* negotiations looking to any such agreement:

(a) for the purchase or sale of specific commercial products;

(b) for the license of specific existing patent rights or from including in any such agreement provision for a non-exclusive grant-back of patent rights on improvements obtained by the licensee during the term of the license or a reasonable period thereafter; or

(c) for the purchase, sale or license of specific existing restricted information or specific engineering services relating to Devices or from including in any such agreement provision for a nonexclusive grant-back of patent rights on improvements obtained by the licensee during the term of the license or a reasonable period thereafter; or from furnishing or acquiring any restricted information directly relating thereto;

(3) from entering into, renewing or performing under any otherwise lawful agreement with any nondefendant person, firm or corporation that does not account for more than 2% of world production of motor vehicle passenger car, truck and bus units in the calendar year preceding the entering into or renewing such agreement (See Appendix A) [Appendix omitted]; or

(4) from entering into, renewing or performing under any agreement which is submitted in writing to the plaintiff and to which plaintiff consents in writing.

(C) Nothing in Section IV (A) (2) (a) shall prohibit any defendant from engaging in any activity outside the United States reasonably necessary:

(1) to the development of, response to, or compliance with existing or proposed vehicle emission laws, regulations or standards of a foreign governmental body, or

(2) to the performance under any otherwise lawful agreement for the production of motor vehicles outside the United States with any person, firm or corporation not engaged in the production of motor vehicles in the United States at the time of entering into or renewing such agreement.

V.

(A) Each manufacturing defendant is ordered and directed to exercise its right to withdraw from the AMA cross-licensing agreement of July 1, 1955, as amended, and to take such steps as are necessary to accomplish said withdrawal within one hundred twenty (120) days from the date of entry of this Final Judgment. Notwithstanding such withdrawal defendants may continue to exercise those

rights and claims relating to royalty-free licenses under the cross-licensing agreement which have accrued up to the date of entry of this Final Judgment.

(B) Defendant AMA is ordered and directed to relinquish its responsibilities under the AMA cross-licensing agreement of July 1, 1955, as amended, within sixty (60) days from the date of entry of this Final Judgment.

VI.

(A) Upon written request therefor and subject to the conditions set forth herein:

(1) Each manufacturing defendant is ordered and directed to grant to any person to the extent that it has the power to do so a nonexclusive, nontransferable and royalty-free license to make, have made, use, lease or sell Devices under any claim of any United States patent or any United States patent application owned or controlled by said defendant or under which it has sublicensing rights, which patent was issued or application was filed prior to the date of entry of this Final Judgment and licensed under the AMA cross-licensing agreement of July 1, 1955, as amended, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license under this paragraph may provide for the payment of those same royalties to the defendant;

(2) Each manufacturing defendant shall grant to any licensee under (1) above, to the extent that it has the power to do so, an immunity from suit under any foreign counterpart patent or patent application for any product manufactured in the United States under the license for sale abroad or for any product manufactured abroad and

sold in the United States, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license may provide for the payment of those same royalties to the defendant; and

(3) Defendant AMA is ordered and directed to make available for examination and copying by any person the technical reports in its possession or control prepared or exchanged by defendants pursuant to said cross-license within two years prior to the entry of this Final Judgment, which are identified in Appendix B [Appendix omitted]; provided that such person agrees to offer each signatory party to the AMA cross-licensing agreement of July 1, 1955, as amended, and any subsidiary thereof a nonexclusive license for a reasonable royalty and upon reasonable terms with respect to any patent or patent application, domestic or foreign, thereafter obtained or filed by such person or under which licensing rights are obtained by such person which is based upon or employs Devices licensed or about which information is supplied pursuant to such license or otherwise under this Section VI(A).

(B) Any existing licensee of any manufacturing defendant shall have the right to apply for and receive a license or licenses under this Final Judgment in substitution for its existing license or licenses from any manufacturing defendant, insofar as future obligations and licenses are concerned. Any licensee shall be free to contest the validity and scope of any licensed patent.

VII.

Defendant AMA is ordered and directed to mail a copy of this Final Judgment to all signatories to the AMA cross-licensing agreement of July 1, 1955, as amended, and to

all known domestic manufacturers of motor vehicles and motor vehicle engines within thirty (30) days from the date of entry of this Final Judgment, and to issue a press release to the domestic trade and business press relating the substance of the Final Judgment.

VIII.

For the purpose of determining or securing compliance with this Final Judgment, duly-authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. Said defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which

the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX.

Section IV(A) (2) (a) and (g) of this Final Judgment shall expire ten years after the date of entry hereof, provided that plaintiff may apply to this Court for the continuation of one or both of said provisions, such application to be made not later than nine years after the date of entry of this Final Judgment.

X.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate in relating to the construction of or carrying out of this Final Judgment, for the modification or vacating of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

APPENDIX B

Excerpts From Transcript

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MANUEL L. REAL, *Judge Presiding*

IN RE: MULTIDISTRICT PRIVATE CIVIL TREBLE DAMAGE ANTI-TRUST LITIGATION INVOLVING MOTOR VEHICLE AIR POLLUTION CONTROL EQUIPMENT. } Docket No. 31

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California
Date: Monday, April 27, 1970

MR. CHAFFETZ: Hammond E. Chaffetz representing General Motors.

It is true that the defendants, or some of them, conceded to an order in the Government's case but that was for a different purpose than the purpose of admitting any violation of law. The real purpose there was to terminate the Government litigation which had been filed and get on with the job, free their experts from involvement in litigation and get on with the job of solving the very difficult problems in which there is so much public interest today.

But this is a different matter now. Here we have cases purportedly filed on behalf of all members of the public. The defendants have no choice here. Despite the inconvenience, despite the expense, despite involvement of their

technical people in this very extensive litigation, they have no alternative but to vindicate themselves.

The reason I bring that up is in connection with the pretrial proceedings it is important for us all to know that these cases are going to the ultimate conclusion (Tr. pp. 36-37).

MR. VERLEGER: Your Honor, Philip Verleger for the defendant Chrysler Corporation.

Now, while I am here I would like to add my words to Mr. Chaffetz's observations concerning the overall merits of this case and the position at least of my particular client.

So far as we are concerned, we believe it is a case to be utterly without merit either factually or legally. It will not be compromised. There will be no negotiated settlement. It will not be ended short of the final judicial determination (Tr. pp. 57-58).

APPENDIX C

The Judicial Panel On Multidistrict Litigation

MULTIDISTRICT PRIVATE CIVIL TREBLE DAMAGE ANTITRUST LITIGATION INVOLVING MOTOR VEHICLE AIR POLLUTION CONTROL EQUIPMENT. } Docket No. 31

Before ALFRED P. MURRAH, *Chairman*, and JOHN MINOR WISDOM, EDWARD WEINFELD*, EDWIN A. ROBSON, WILLIAM H. BECKER, JOSEPH S. LORD, III and STANLEY A. WEIGEL, *Judges of the Panel*

Per curiam:

Transfer of the actions listed on Schedule A to a single district for coordinated or consolidated pretrial proceedings has been considered by the Panel on its own initiative. An order to show cause was entered on December 16, 1969 and a hearing was held in Washington, D.C. on January 23, 1970. The parties generally agreed that transfer under Section 1407 was necessary[1] but disagreed as to what would be the most appropriate transferee forum and as to the proper "timing" for the transfer. Counsel for certain plaintiffs argued that it would be best to defer further consideration for approximately sixty days to await the outcome of appeals to the United States Supreme Court from orders of the United States District Court for

* Although Judge Weinfeld did not attend the hearing he has, with the consent of all parties participated in this decision.

1. The American Petroleum Institute and nineteen individual oil companies, defendants in the *Handy case* (C.D. Calif.), opposed transfer of that action to any other district. That action has since been dismissed as to these defendants and they are no longer parties in any of these actions.

the Central District of California denying intervention in the *government suit*.[2] This matter was therefore continued for approximately sixty days and was reset for hearing in San Francisco on March 20, 1970.[3]

We think this sixty day stay was helpful for the status and scope of this multidistrict litigation are much clearer now. The oil companies, defendants in only one action, were eliminated by voluntary dismissal and the appeals to the United States Supreme Court have been resolved. Several new actions were filed during this period and while many more can be expected, those now before us are representative ones with respect to parties, claims and geographical distribution.

All parties now favor immediate transfer to a single district so that pretrial proceedings can commence without

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2. On January 10, 1969, the United States brought an antitrust enforcement action against the Automobile Manufacturers Association and the "Big Four" of the automotive industry. The defendants and the co-conspirators (which included the remaining domestic manufacturers of motor vehicles) were charged with having been engaged since 1953 in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in motor vehicle air pollution control equipment by having agreed to "eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and to eliminate competition in the purchase of patents and patent rights covering motor vehicle air pollution control equipment."

On October 29, 1969 a *consent decree* was entered prohibiting the defendants, *inter alia*, from combining or conspiring to prevent, restrain or limit the development, manufacture, installation, distribution or sale of air pollution control equipment and requiring the defendants to make available to all applicants on a royalty free basis, licenses on air pollution control patents. The City of New York was denied leave to intervene in this action both before and after the approval of the consent judgment and sought to appeal this denial to the United States Supreme Court. The judgment of the district court was summarily affirmed on March 16, 1970. The plaintiffs in the *Grossman case* (C.D. Calif.), attempted to consolidate their suit with the government action and this request was also denied. Their appeal to the United States Supreme Court was dismissed.

3. The hearing was originally scheduled for March 27, 1970 but the order was amended to change the date to March 20, 1970.

duplication or disruption. We need not pause very long to establish the statutory prerequisites for transfer under Section 1407. Although now involving but a small number of individual actions, this litigation could quickly become the largest and most complicated multidistrict litigation commenced since this panel was established less than two years ago. These actions have been brought by cities, states and individuals with class action claims purporting to encompass all residents of the United States. Each complaint alleges a national conspiracy and thus the existence, scope, and effect of the alleged conspiracy are common to all actions. It is manifest that the transfer of all actions to a single district for coordinated or consolidated pretrial proceedings will clearly promote the just and efficient conduct of this litigation and will serve the convenience of all parties and their witnesses.

We turn now to the disputed issue: the selection of a transferee forum. The defendants favor the Eastern District of Michigan or, as a second choice, the Central District of California. Most plaintiffs oppose both of these selections[4] and urge that the actions transferred to a district more convenient to them, either the Southern District of New York, the Eastern District of Pennsylvania, or the Northern District of Illinois.[5]

4. It has also been suggested that the Panel cannot transfer these actions to the Eastern District of Michigan since there are no related actions pending in that district. We think the language of the statute clearly permits transfer to *any district* regardless of whether or not there are any related actions pending in the transferee district.

5. Counsel for the State of Wisconsin urges that all multi-district private antitrust litigation should not be concentrated by the Panel in a few metropolitan centers like New York, Philadelphia, Chicago or San Francisco, but that such litigation should, on occasion, be transferred to a less populous area, preferably to a state capital where the attorney general could act as liaison counsel for the plaintiffs. It may be unfortunate that litigation of this type tends to gravitate to the larger metropolitan areas but we note that many states prefer to commence their actions in these

We think that the Central District of California clearly stands out as the most appropriate transferee forum. It was there that the United States brought its action and the Grand Jury documents which the plaintiffs have sought to use have been impounded by that court. The scope and breadth of the private actions commenced in the Central District of California are at least equivalent to those filed in the Northern District of Illinois or the Eastern District of Pennsylvania. While it is undoubtedly true that many of the witnesses whose deposition testimony will be taken during pretrial proceedings are located in the Detroit area[6] it is also true that many "air pollution experts" reside in the Los Angeles area and it is likely that many of them will also be deposed. It is also alleged that certain conspiratorial activity occured in Los Angeles in connection with meetings between representatives of the auto industry and officials of the State of California and the City and County of Los Angeles with regard to the promulgation and implementation of air pollution control standards. For these and other reasons we believe that the "center of gravity" of this litigation is in the Los Angeles area.

All of the private actions filed in the Central District of California since the entrance of the consent decree have been assigned to Judge Manuel Real. Judge Real is willing to undertake the supervision of pretrial proceedings in this multidistrict litigation and Chief Judge Thurmond

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metropolitan areas rather than in federal courts in their own states. In any event, we do not see how transfer of *these actions* to the Western District of Wisconsin would serve the convenience of the parties and witnesses save the State of Wisconsin.

The State of California vigorously supports the selection of the Central District of California as the transferee court.

6. If extensive deposition testimony is to be taken in the Detroit area, the Panel could designate one of its members or any other circuit or district judge to conduct such depositions pursuant to 28 U.S.C. §1407 (b).

Clarke has consented to the assignment of all related actions to Judge Real.[7]

IT IS THEREFORE ORDERED that the actions listed on Schedule A now pending in other districts be and the same are hereby transferred to the United States District Court for the Central District of California and assigned to Judge Manual Real for coordinated or consolidated pretrial proceedings under 28 U.S.C. §1407.

7. The written consent has been filed with the clerk of the Panel in Washington, D.C.

Dakota

IN THE

SUPREME COURT OF THE UNITED STATES

SEP 24 1970
E. ROBERT SEAVER, CLERK
Supreme Court, U. S.
FILED
APR 24 1972
MICHAEL RODAK, JR., CLERK

October Term 1970

No. 45 Original

STATE OF WASHINGTON, STATE OF ILLINOIS,
STATE OF ARIZONA, STATE OF COLORADO,
STATE OF HAWAII, STATE OF IOWA,
STATE OF KANSAS, STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MINNESOTA, STATE OF MISSOURI,
STATE OF OHIO, STATE OF RHODE ISLAND,
STATE OF VERMONT, AND
COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland Corporation, and
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,

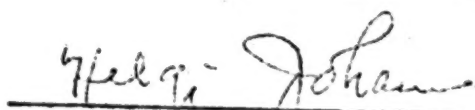
Defendants.

MOTION FOR ORDER OF COURT GRANTING
LEAVE TO PETITIONER TO JOIN CAUSE
AS PARTY PLAINTIFF

THE STATE OF NORTH DAKOTA, a sovereign state of the United States of America, by and through its Attorney General, petitions the Court for an Order granting the State of North Dakota leave to join as a party plaintiff in the above entitled cause, and for leave to adopt, endorse and re-affirm the Motion For Leave To File Complaint, Brief in Support, thereof, and Complaint heretofore filed in this cause by Plaintiff states herein, and in support thereof asserts: that the right to relief sought herein by the State of North Dakota is the same as sought in this proceeding by the States of Washington, Illinois, Kansas, Maine, the Commonwealth of Massachusetts, Minnesota, Misscuri, Ohio, Rhode Island, Vermont, and the Commonwealth of Virginia, co-plaintiffs in this cause, concern the

same occurrences and presents common questions of law and fact.

Respectfully submitted,



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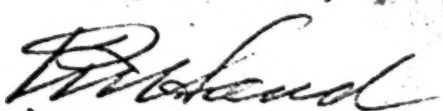

Paul M. Sand
First Assistant
Attorney General
State Capitol
Bismarck, North Dakota

No. 45 Original

OCT 3 1970

E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF WASHINGTON, et al.,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, et al.,

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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SORG/CHICAGO U.S.A.

INDEX

	PAGE
Question Presented	1
Statement	2
1. The Background of Industry and Governmental Efforts to Control Auto Pollution	2
2. The Related Government and Private Suits Involving Auto Pollution	6
3. The Present Proceeding	9
Argument	11
1. Plaintiffs Have a Suitable Alternative Forum in Other Courts	11
2. The Facilities of the District Courts Are Better Adapted to Complex Trials of Factual Issues Than Those of This Court	14
3. Invocation of This Court's Original Jurisdiction is not Required to Insure the Expeditious and Fair Handling of this Matter	17
a. The alleged saving in time from an original action is illusory	17
b. Plaintiffs do not need an original action in this Court to secure a single unified trial	19
4. There is No Public Need for the Exercise of This Court's Original Jurisdiction	20
Conclusion	24

TABLE OF AUTHORITIES CITED

Cases

PAGE

Aircraft and Diesel Corp. v. Hirsch, 331 U.S. 752, 767 (1947) 23

Beacon Theatres v. Westover, 359 U.S. 500 (1959) 19

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In re Children's Books, 297 F. Supp. 385 (JPML, 1968) 17

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PAGE

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Oklahoma v. Cook, 304 U.S. 387, 394 (1938) 16

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United Mine Workers v. Gibbs, 383 U.S. 715, 721-729 (1966) 12, 13

United States v. Addyston Pipe and Steel Co., 85 Fed. 271 (C.C.A. 6th, 1898), aff'd, 175 U.S. 211 (1899).... 12

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United States v. Singer Mfg. Co., 374 U.S. 174, 175 n. (1963) 15

United States v. Western Pacific R. Co., 352 U.S. 59, 64-65 (1956) 23

Utah v. United States, 394 U.S. 89, 95 (1969) 11

Statutes

PAGE

Air Quality Act of 1967 (81 Stat. 485, 42 U.S.C. § 1857 et seq.) 22

California Health & Safety Code,

§§ 426.1, 426.5 3

§ 39129(d) 22

California Stats. 1959, ch. 200, § 1, p. 2091 3

Constitution, Art. III, § 2 11

31 Fed. Reg. 5170 (1966) 5

Judicial Code, 28 U.S.C. § 1407 8

Motor Vehicle Air Pollution Control Act (79 Stat. 992) 4

National Emission Standards Act (81 Stat. 499),

42 U.S.C. § 1857f-1 4

§ 1857f-6a(a) 4

§ 1857f-6a(b) 4

§ 1857f-6a(c) 5

28 U.S.C. § 1251(b)(3) 11

§ 1407 ..... 8, 20

§ 1254(1) 18

Miscellaneous

PAGE

Advance Notice of Proposed Rule Making, 35 Fed. Reg. 2791 (February 10, 1970) 5, 6

45 C.F.R. Part 85 (January, 1970) 5

116 Cong. Rec. 16260 5

Gerhardt, Incentives to Air Pollution Control, 33 Law & Contemp. Probs. 358, 359 (1968) 3

HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions From Mobile Sources, ¶ 4.5, ¶4.5.3 (March, 1970) 5

p. xv 4

HEW press release, National Air Pollution Control Administration, Rockville, Maryland (July 15, 1970) 6

H.R. 17255, 91st Cong., 2d Sess., § 202 (b)(1) (1970).. 5

§ 211 21

Haagen-Smit, Chemistry and Physiology of Los Angeles Smog, 44 Ind. & Eng. Chem. 1342 (1952).... 2

Manual for Complex and Multi-District Litigation 20

Report of the Panel on Electrically Powered Vehicles to the Commerce Technical Advisory Board, the Automobile and Air Pollution: A Program For Progress, Pt. 1, at 36 (Dept. of Commerce Print, October, 1967) 3

Ruff, The Economic Common Sense of Pollution, The Public Interest, Issue No. 19, Spring, 1970, pp. 69-85 3

S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967) 5

Second Report of the Secretary of Health, Education and Welfare, S. Doc. No. 91-11, 91st Cong., 1st Sess., pp. 38-40 (1969) 6

Supreme Court Rule 9(2) 15

In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 45 Original

STATE OF WASHINGTON, et al.,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, et al.,

Defendants.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

QUESTION PRESENTED

Fifteen States have petitioned this Court to entertain an original action against the four major motor vehicle manufacturers and the Automobile Manufacturers Association, all of which are citizens of other states. The proposed complaint poses complex factual issues under the Federal antitrust laws, the common law of conspiracy in restraint of trade and the common law of public nuisance, and seeks injunctive relief in areas already subject to a Government consent decree and far-reaching legislative

and administrative regulation. The question presented is whether this Court, in the exercise of its sound discretion, should refuse to assume jurisdiction since:

1. The plaintiff States have an adequate alternative forum in other courts, to which some of them have already resorted for similar relief against the same defendants in pending litigation;

2. The initial disposition of the controversy by the lower courts would better serve the interests of convenience, efficiency and justice; and

3. The specific relief sought by the plaintiffs—including the adoption by this Court of appropriate anti-pollution standards and supervision of their implementation and mandatory installation of emission controls on new and used cars at defendants' expense—would require inappropriate and unwarranted judicial intervention in a highly technical field currently subject to extensive state and federal regulation.

STATEMENT

1. The Background of Industry and Governmental Efforts to Control Auto Pollution.

In the early 1950's, when it was first recognized that motor vehicle emissions were a source of air pollution in the Los Angeles area,[1] California officials urged the automobile industry to reduce the emission of atmospheric pollutants by motor vehicles. From the beginning, it was recognized that automotive emissions were a potential

[1] See Haagen-Smit, *Chemistry and Physiology of Los Angeles Smog*, 44 Ind. & Eng. Chem. 1342 (1952).

subject for government regulation. The present litigation has its origin in the cooperative research and development program which was initiated, in response to the pressure of California officials, to measure such emissions, to develop preventative devices and to formulate test procedures for measuring the efficacy of such devices. As part of that program, the manufacturers in 1955 entered into an open-access, royalty-free, cross-licensing agreement as the basis for industry-wide exchanges of technical and engineering information about the nature, measurement and control of vehicle emissions. These industry cooperative efforts were initiated before the adoption of specific legislation regulating vehicle emissions by the Federal or State governments and absent any market demand for automotive emission controls.[2]

Comprehensive state regulation of vehicle exhaust emissions began with a 1959 California statute which required the State Department of Public Health to develop standards of air quality for motor vehicles. Cal. Stats. 1959, ch. 200, § 1, p. 2091; Cal. Health & Safety Code, §§ 426.1, 426.5. Exhaust emission controls first became mandatory

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[2] The market demand which creates a normal competitive incentive is not present because the installation of air pollution devices tends to increase a car's cost and affect its engine performance without increasing its saleability to the ultimate consumer. See, *e.g.*, Gerhardt, *Incentives to Air Pollution Control,* 33 Law & Contemp. Probs. 358, 359 (1968); Report of the Panel on Electrically Powered Vehicles to the Commerce Technical Advisory Board, The Automobile and Air Pollution: A Program For Progress, Pt. 1, at 36 (Dept. of Commerce Print, October, 1967); Ruff, *The Economic Common Sense of Pollution,* The Public Interest, Issue No. 19, Spring, 1970, pp. 69-85.

in California for 1966 model cars.[3] On October 20, 1965, Congress enacted the Motor Vehicle Air Pollution Control Act (79 Stat. 992), which was amended and revised in 1967 to become the National Emission Standards Act (Title II of the Air Quality Act of 1967, 81 Stat. 499, 42 U.S.C. § 1857f-1). The statute directed that the Secretary of Health, Education and Welfare:

> "[s]hall by regulation, giving appropriate consideration to technological feasibility and economic costs, prescribe as soon as practicable standards, applicable to the emission of any kind of substance, from . . . new motor vehicles . . . , which in his judgment cause or contribute to, or are likely to cause or to contribute to, air pollution which endangers the health or welfare of any persons . . ."[4]

The Federal Act provides that "no State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this Act" (42 U.S.C. §1857f-6a(a)),[5] but preserves the right of the states "otherwise to control, regulate or restrict the

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[3] Acting on their own, the companies had voluntarily installed crankcase emissions controls on 1961 model cars sold in California starting in 1960, and on 1963 model cars sold nationally in 1962. Crankcase emission controls became mandatory in California for 1963 models. HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions From Mobile Sources, p. xv (March, 1970).

[4] 42 U.S.C. § 1857f-1(a).

[5] Except in the case of California, for which the Secretary may grant waivers of preemption under specified circumstances. 42 U.S.C. § 1857f-6a(b). Operating under such a waiver, California has enacted standards, applicable to 1970-1974 model year vehicles, for emissions control which are more stringent than current Federal requirements.

use, operation, or movement of registered or licensed vehicles" (§ 1857f-6a(c)).[6]

Based on technical data supplied by the automobile industry, the State of California and its own staff, the Department of Health, Education and Welfare has prescribed rigid emissions standards. Such standards were initially set for the 1968 model year,[7] and the Secretary has established increasingly stringent standards for emissions control through the 1971 model year.[8] Still more demanding proposals have been announced for the 1973 and 1975 model years,[9] and a bill is currently before Congress which would require the Secretary to impose even stricter standards for 1975 model vehicles than those currently proposed.[10] Even without this proposed legislation, the effect of the presently envisioned 1975 standards will be to reduce total hydrocarbon emissions 97% as compared with uncontrolled models and carbon monoxide emissions by 91%, and also

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[6] See S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967); HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions From Mobile Sources, ¶ 4.5, ¶ 4.5.3 (March, 1970). This power to impose emission controls on used vehicles has not been exercised, except for some devices in some areas in California as to cars when they are transferred.

[7] 31 Fed. Reg. 5170 (1966).

[8] 45 C.F.R. Part 85 (January, 1970).

[9] Advance Notice of Proposed Rule Making, 35 Fed. Reg. 2791 (February 10, 1970).

[10] Such a requirement is contained in the Senate version of the bill, approved by the Senate September 22, 1970. 116 Cong. Rec. 16260. The bill is now before a conference committee. H.R. 17255, Cong., 2d Sess. §202(b)(1) (1970).

substantially to reduce emissions of oxides of nitrogen and particulates.[11]

2. The Related Government and Private Suits Involving Auto Pollution.

On January 10, 1969, the United States filed a complaint in the United States District Court for the Central District of California charging, in substance, that the cooperative efforts of the defendant automobile manufacturers and the Automobile Manufacturers Association to develop anti-pollution devices had restrained competition in such devices in violation of the Sherman Act. The filing of that complaint as a practical matter compelled the negotiation of a consent decree. The complaint challenged the practice of acting jointly in response to the demands of governmental agencies. But such cooperation by industry as a whole with government was essential to meet many of the difficult problems, such as, for example, the establishment of a workable method of measuring automobile emissions in the interest of the public as well as the industry. Once the civil suit was filed, however, the continuance of cooperation would have exposed company engineers and scientists to potential claims that they were consciously flouting the antitrust laws, with the possible risk of criminal prosecution. And the resulting uncertainties and distractions would clearly have impeded scientific progress in emission reduction.

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[11] Department of HEW press release, National Air Pollution Control Administration, Rockville, Maryland (July 15, 1970). The standards established by the Secretary for the 1970 and 1971 model years reduced hydrocarbon and carbon monoxide emissions by more than two-thirds in comparison with pre-1968 vehicles. Second Report of the Secretary of Health, Education and Welfare, S. Doc. No. 91-11, 91st Cong., 1st Sess., pp. 38-40 (1969); Advance Notice of Proposed Rule Making, 35 Fed. Reg. 2791 (Feb. 10, 1970).

On September 11, 1969, the parties filed in the District Court a proposed consent decree which enjoined continuation of those aspects of defendants' cooperative program to which the Government objected and prescribed precise rules as to the types of continuing technical cooperation to which the Government did not object[12] and which would be permitted in the future. After hearing objections and motions to intervene from various sources, the court approved the decree on November 29, 1969 (*United States* v. *Automobile Manufacturers Association,* 307 F. Supp. 617), observing that "the Government's case is based upon a novel and unadjudicated theory." (*id.* at 621). The decree was affirmed by this Court on March 16, 1970, *sub nom. City of New York* v. *United States,* 397 U.S. 248.

Beginning on September 16, 1969, a series of 17 private antitrust suits were filed in district courts in Illinois, California, Pennsylvania, New York, Wisconsin and Minnesota. The actions were brought by the States of Illinois, California, Connecticut, New Jersey, New Mexico, New York, Wisconsin and Minnesota, and by various individuals and municipalities on behalf of classes which in total included all residents of the United States as well as all States and municipalities. The substantive allegations of the complaints were taken almost *in haec verba* from the Government's complaint. In all cases the plaintiffs seek damages for the alleged injuries caused by automobile emissions attributable to the alleged antitrust violation, and request trial by jury. In all but one case there is also a prayer for equitable relief. In many of the cases the

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[12]A Department of Justice press release dated September 11, 1969 stated that the decree had received the approval of the Department of Health, Education and Welfare, the Science Advisor to the President, and representatives of the Air Resources Board of the State of California.

equitable relief requested, taken as a whole, is the same as that sought here, *viz.*, an injunction against the continuation of any illegal activities and a requirement that defendants install pollution control devices at their own expense in all new and most used vehicles.

The pendency of these related cases led the Judicial Panel on Multidistrict Litigation, on its own motion, to issue an order to show cause why the cases should not be transferred and consolidated for pretrial purposes pursuant to Section 1407 of the Judicial Code. On April 6, 1970, the Panel ordered all of the then pending cases[13] consolidated for pretrial purposes before the Hon. Manuel L. Real in the Central District of California "so that pretrial proceedings can commence without duplication or disruption."[14] Since that time, Judge Real has allowed certain cases to proceed as class actions on behalf of all states and political subdivisions thereof and of all crop farmers, but not on behalf of all individuals in the nation or in the plaintiff States or cities. At the same time he denied defendants' motion to dismiss the complaints.[15] Thereafter the Court authorized discovery to commence by allowing all parties to inspect and copy nearly all the documents obtained by the Antitrust Division and the grand jury in connection with the prior Government investigation.[16]

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[13] The subsequent *City of New York* and *Minnesota* cases were thereafter ordered transferred.

[14] See the decision of the Judicial Panel reprinted in Appendix C to Plaintiffs' Brief in Support of Motion for Leave to File Complaint.

[15] *In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment*, M.D.L. Doc. No. 31 (U. S. Dist. Ct. Central Dist. Calif.), order of September 4, 1970.

[16] *Id.*, Transcript of September 14, 1970, pp. 348-354.

In addition to the foregoing antitrust actions, the City of Chicago, on July 31, 1970, filed a tort suit in equity in the Northern District of Illinois alleging that automobile emissions are harmful to the public and that the vehicles designed and developed by defendants were unreasonably dangerous and defective because of the emission of pollutants. The complaint prays that defendants should be enjoined from selling new vehicles in Chicago which do not conform to specified emission standards and that they be required to install air pollution devices without charge in all used cars manufactured between 1960 and 1970.

3. The Present Proceeding.

On August 5, 1970, 15 States (including Illinois and Minnesota, which had also filed suits in the district courts) moved for leave to file an original action in this Court. Count I of the attached complaint charges a violation of the Federal antitrust laws in substantially the same language as in the antitrust cases brought in the district courts. Count II, realleging the same facts, asserts that it is brought "under this Court's general equitable powers . . . independent of the Sherman and Clayton Acts, to eliminate and remedy conspiracies in restraint of trade by the defendants, as recognized at common law. . . ." Count III, entitled "Public Nuisance", alleges that automobile emissions are dangerous to "human health and welfare" and harmful to "flora and fauna", and that the continued manufacture and distribution of motor vehicles "as presently engineered and designed" constitute a nuisance "contrary to the public policy of the Plaintiff States, as well as the federal government. 42 U.S.C., § 1857(4)(8) [sic]." There is no allegation that defendants have not complied with the standards prescribed by the Department of Health, Education and Welfare, the requirements of the consent decree, or any federal or state law relating to emission controls on used cars.

The complaint prays for a declaration that defendants' conduct was unlawful (Prayer, par. 1) and for a general injunction against its continuance (Prayer, par. 5). In addition, plaintiffs seek mandatory orders requiring defendants:

> Prayer, par. 2. To accelerate "spending, research and development designed to produce a fully effective pollution control device or devices and/or pollution free engine at the earliest feasible date as shown by the evidence, specifically, if applicable on the evidence, that date by which such device or devices or such pollution free engine would have been developed but for the conspiracy alleged herein."
>
> Prayer, Par. 3. " * * * to cause to be installed, at defendants' expense, as standard equipment in all new motor vehicles sold, or delivered in the United States such effective anti-pollution control devices as could have been installed in said motor vehicles but for the conspiracy alleged herein."
>
> Prayer, Par. 4. " * * * to cause to be installed, at defendants' expense, such effective anti-pollution control devices, as the Court deems reasonable and proper, on all motor vehicles owned or possessed by anyone in the United States, manufactured by the defendants during or following the period of the conspiracy alleged herein."

The relief sought here is in substance that already requested in the cases pending in the district courts, although paragraph 2 of the prayer would appear to go further in requiring this Court to supervise a research and development program to solve the automotive emission problem.

ARGUMENT

This Court has original but not exclusive jurisdiction over suits "by a State against the citizens of another State" (28 U.S.C. § 1251(b)(3); Const., Art. III, § 2). The exercise of this jurisdiction is "not mandatory in every case" (*Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 464 (1945)) and is to "be invoked sparingly" (*Utah* v. *United States*, 394 U.S. 89, 95 (1969)). Thus "the Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. at 464-65; *Massachusetts* v. *Missouri*, 308 U.S. 1, 18-20 (1939).

Here, there is no want of other suitable forums to try the federal antitrust issues which plaintiffs seek to bring before this Court, as the cases pending in other federal courts attest. The common law restraint of trade and nuisance claims, if they involve a common nucleus of fact, could be heard in the same federal courts under the doctrine of pendent jurisdiction or, if not, in the courts of the respective plaintiff States. Clearly the trial of such issues in trial courts is preferable to initial proceedings in this Court, particularly since the presence of the federal legislative scheme and the consent decree demonstrates that there is no pressing need for action by this Court.

1. Plaintiffs Have A Suitable Alternative Forum In Other Courts.

To support the exercise of jurisdiction over Count I, plaintiffs rely mainly on *Georgia* v. *Pennsylvania R. Co.*, the only antitrust case in which this Court has granted

leave to file a complaint.[17] In that case, however, the Court left little doubt that if plaintiffs could have obtained jurisdiction over the defendants in a single district, a denial of leave to file would have been "wholly appropriate", since the "facilities and prescribed judicial duties [of the district court] are better adapted to the extended trial of issues of fact than are those of this Court" (324 U.S. at 465 (Douglas, J.), 469-470 (Stone, C. J., dissenting)). It was only because the Court found that in no place other than the Supreme Court could Georgia obtain jurisdiction over all the defendant railroads that it granted the motion for leave to file the complaint.[18] In the instant case, there is no question that all the defendants are suable in the same district, as they already have been in a number of districts.

The common law antitrust count is in no different posture. Clearly a district court having jurisdiction over the statutory antitrust claim would have pendent jurisdiction over Count II (*United Mine Workers* v. *Gibbs*, 383 U.S. 715, 721-729 (1966)). In any event, the common law (which under *Erie* v. *Tompkins* would presumably be the law of the several states) provides no basis for antitrust relief broader than that available under the federal antitrust statutes, which were designed to strengthen and reinforce the early common law doctrines.[19]

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[17] After hearings by a special master, the complaint was eventually dismissed on the motion of all parties (340 U.S. 889 (1950)).

[18] The dissenting opinion of Chief Justice Stone, on behalf of four Justices, thought this fact not established, and also insufficient of itself to warrant an exercise of the original jurisdiction.

[19] The opinion of then Circuit Judge Taft in *United States* v. *Addyston Pipe and Steel Co.*, 85 Fed. 271 (C.C.A. 6th, 1898), aff'd, 175 U.S. 211 (1899), reviews the common law authorities. See also

With respect to Count III, which charges a public nuisance, plaintiffs have either the federal district courts or the State courts open to them. If the nuisance and antitrust claims are found to be derived "from a common nucleus of operative fact" (*United Mine Workers* v. *Gibbs,* 383 U.S. at 725), a federal court having jurisdiction over the antitrust charges could also have pendent jurisdiction over the nuisance claim. Whether or not such pendent jurisdiction is found to exist, the courts of each plaintiff State clearly would have jurisdiction to hear the nuisance allegations, and plaintiffs do not suggest that these defendants are not subject to the jurisdiction of the State courts. The case thus differs fundamentally from the nuisance cases in which this Court has exercised original jurisdiction, where no other suitable forum was available to the complaining State. Contrast *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230 (1907); *Missouri* v. *Illinois,* 180 U.S. 208 (1901), 200 U.S. 496 (1906); *New York* v. *New Jersey,* 256 U.S. 296 (1921); *New Jersey* v. *New York City,* 283 U.S. 473 (1931). There is no indication here, as there was in those cases, of a conflict between the states necessitating resort to the original jurisdiction of this Court as the constitutional substitute for the use of diplomacy or force by one state in dealing with another

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(footnote 19 continued)

Standard Oil Co. v. *United States,* 221 U.S. 1, 50-51; 58 (1911). In *Georgia* v. *Pennsylvania R. Co.,* Chief Justice Stone, dissenting, noted that (324 U.S. at 469):

> "The Court disregards the fainthearted and unconvincing assertion of the State that it has a 'common law' cause of action entitling it, independently of the Clayton Act and the federal antitrust laws, to maintain the present suit . . . We are of the opinion that the objections to the maintenance of the present suit are essentially the same, whether it be regarded as a suit upon a cause of action arising under the Clayton Act or as one maintainable upon the equitable principles generally applicable in the federal courts independently of the Clayton Act."

(180 U.S. at 241; 200 U.S. at 518, 520-521; 206 U.S. at 237). Thus, no need for the extraordinary resort to this Court's original jurisdiction has been established.

Plaintiffs make the novel suggestion that this Court should exercise original jurisdiction because no other *Federal* court can hear the nuisance claim because of the absence of a Federal question and diversity of citizenship (Pl. Br., p. 16). But the lack of a Federal question or other basis for Federal jurisdiction is hardly a reason for this Court to take a case which could otherwise be brought in state courts.

2. The Facilities Of The District Courts Are Better Adapted To Complex Trials Of Factual Issues Than Those Of This Court.

It would seem obvious that the district courts are more suitable than this Court for the trial of cases involving issues of fact, particularly complex cases such as these. Some of the reasons why this is true were stated by Chief Justice Stone in his dissenting opinion in *Georgia* v. *Pennsylvania R. Co.*, as follows (324 U.S. at 469-470):

> ". . . the remedy asked is one normally pursued in district courts whose facilities and prescribed judicial duties are better adapted to the trial of issues of fact than are those of this Court. In an original suit, even when the case is first referred to a master this Court has the duty of making an independent examination of the evidence, a time-consuming process which seriously interferes with the discharge of our ever-increasing appellate duties. No reason appears why the present suit may not be as conveniently proceeded with in the district court of the proper venue as in this Court, or why the convenience of the parties and witnesses, as well as of the courts concerned, would be better served by a trial before a master appointed by this Court than by a trial in the appropriate dis-

> trict court with the customary appellate review. The case seems preeminently one where this Court may and should, in the exercise of its discretion and in the interest of a more efficient administration of justice, decline to exercise its jurisdiction, and remit the parties to the appropriate district court for the proper disposition of the case there. . . ."

The opinion of the Court (per Douglas, J., 324 U.S. at 465), did not disagree with these reasons; it merely concluded that they were inapplicable to the *Georgia* case since all of the defendants were not suable in the same district. There being no difficulty in obtaining jurisdiction over all the defendants in the same district in the instant litigation, the reasoning of Chief Justice Stone should control here. While assignment to a special master, who would be guided by the Rules of Civil Procedure (Supreme Court Rule 9(2)), might result in a trial not significantly different from trial in a district court, experience indicates that masters' hearings often take substantially longer. Moreover, a master's rulings, even on interlocutory matters, are merely recommendations, which must come before this Court for consideration and approval. The judgment of a district court on the other hand is binding in the absence of an appeal, and many orders, judgments or parts of judgments are never taken to an appellate tribunal.

There is the further drawback that in reviewing a master's findings this Court does not have the benefit of "the valuable assistance of the Courts of Appeals" (*United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n. (1963)). Consequently, as with direct appeals under the Expediting Act, the Court is faced with "the often arduous task of searching through voluminous trial testimony and exhibits to determine whether . . . findings of fact are supportable" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 364 (Harlan, J.)).

For these reasons, this Court has on several occasions expressed its unwillingness to assume original jurisdiction over types of cases which might frequently bring before it litigation which would otherwise be disposed of in lower courts. Thus, in *Massachusetts* v. *Missouri*, 308 U.S. 1, 19 (1939), the Court observed that:

> ". . . To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it. . . ."

Cogent reasons, the Court said (*ibid.*) "point to the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States." *Oklahoma* v. *Cook*, 304 U.S. 387, 394 (1938), on the same grounds, rejected an original action to enforce claims of an insolvent institution against citizens of other States.

These considerations point even more forcefully to the undesirability of permitting States to invoke the original jurisdiction in complex antitrust cases. For in recent years States have become increasingly active in instituting antitrust suits on behalf of themselves, their governmental subdivisions, and their citizens.[20] An appellate court is obviously neither designed nor equipped to try such cases.

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[20] Among the cases brought by States in recent years are *Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F.Supp. 391 (S.D. Iowa, 1968), aff'd on other grounds, 408 F.2d 1171 (8th Cir., 1969) and 409 F.2d 1239 (8th Cir., 1969); *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559 (D. Minn., 1968); *Hawaii* v. *Standard Oil*

3. Invocation Of This Court's Original Jurisdiction Is Not Required To Insure The Expeditious And Fair Handling Of This Matter.

Plaintiffs argue that this Court should take jurisdiction because of the alleged urgency of the problem presented, and because this Court is purportedly the only forum where a single unified trial can be obtained. Neither argument withstands analysis.

a. The alleged saving in time from an original action is illusory.

Plaintiffs do not claim there would be a saving in pretrial or trial time. On the contrary, they suggest that the pretrial in this Court be coordinated with the pretrial in the pending multi-district litigation and that a district judge be appointed as special master to try the case. A trial does not become more expeditious because a district judge is denominated a "master". Indeed, trial under such a procedure might be slower, since this Court might have to rule on interlocutory matters which would not ordinarily be presented to an appellate body.

Plaintiffs' only alleged time saving would thus result from the elimination of the court of appeals from the case, and it is apparent from plaintiffs' brief (p. 21) that this is their primary concern. Of course, time can be saved in any case by skipping the court of appeals. This Court, however, does not regard the time spent in a court of

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(footnote 20 continuel)

Co., 301 F. Supp. 982 (D. Haw., 1969); *In re Antibiotic Drugs*, 295 F. Supp. 1402 (JPML, 1968); *In re Western Liquid Asphalt*, 303 F.Supp. 1053 (JPML, 1969); *In re "West of the Rockies" Concrete Pipe*, 303 F. Supp. 507 (JPML, 1969); *In re Plumbing Fixtures*, 295 F. Supp. 33 (JPML, 1968); *In re Children's Books*, 297 F. Supp. 385 (JPML, 1968); *In re Concrete Pipe (East)*, 302 F. Supp. 244 (JPML, 1969); *In re Admission Tickets*, 302 F. Supp. 1339 (JPML, 1969).

appeals as wasted, as is shown by its criticism of the present statutory provisions for direct appeals in antitrust cases. See p. 15, *supra*. The review by the intermediate court of voluminous fact findings often relieves this Court of that burden, either because the parties do not challenge large portions of the findings of the court of appeals or because this Court refuses to review them.

Furthermore, if the principal objection is to the time consumed by review in a court of appeals, the remedy is not invocation of this Court's original jurisdiction but the granting of a writ of certiorari to review the district court's judgment before hearing in the court of appeals, pursuant to 28 U.S.C. § 1254(1). Whether there will be a need for expedition which warrants this extraordinary step, reserved for matters of great importance, can obviously better be assessed after the Court has the benefit of a decision in the district court.

Finally, plaintiffs' insistence that the urgency of the problem requires immediate action by this Court completely disregards the existing legislative and administrative machinery for dealing with this very matter. Plaintiffs also ignore the relief which has already been obtained in the Government antitrust action. Thus, the substance of the urgency argument is that Congress, the federal administrative agencies, and the States, including the plaintiff States, are not acting rapidly enough, and that this Court alone can provide the speedy remedy which is required. There is no reason to believe, however, that the responsible public officials are not fully mindful of the public interest in this area, which, as we show below (*infra*, pp. 20-24), is much more suitable for legislative and administrative regulation than for judicial control and administration.

b. Plaintiffs do not need an original action in this Court to secure a single unified trial.

Plaintiffs say that a single unified trial can be held only in the Supreme Court; the alternative, in their view, is 15 separate actions in the 15 respective states. But there is nothing to prevent all the plaintiffs from joining in a single suit in any of the numerous districts in which jurisdiction over the defendants can be obtained. If a unified trial is as desirable as plaintiffs assert, they can obtain it at their own option.

Plaintiffs are not seeking merely a single unified trial, but a trial in *this* Court, which they believe would be dispositive of all of the multi-district litigation, including the cases now pending before Judge Real. Certainly a decision by this Court would, as a practical matter, be controlling throughout the nation. But this would be true in any kind of case the Court might be willing to hear originally. It is clearly not a sufficient basis for trying exceedingly complicated litigation in this Court.

Furthermore, the cases presently pending in the district courts involve plaintiffs who could not be parties to an original action in this Court, and involve claims for damages to be tried before juries. *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959), holds that the right to trial by jury in an antitrust case may be impaired if the merits of injunctive and other equitable prayers arising out of the same issues are first tried to the court in equity. The same considerations should make this Court reluctant to accept jurisdiction of this matter in order to reach a judgment based on a master's report before the presently pending jury cases can be tried. The constitutional difficulties suggested by the *Beacon Theatres* decision are, of course,

obviated by remitting these plaintiffs to the district court where trial judges can arrange for the appropriate order of trial of both the legal and equitable claims.

Plaintiffs' criticism of the alleged inadequacies of district court jurisdiction does an injustice to the formal and informal mechanisms available for the just and efficient disposition of multi-district litigation. At the request of the Judicial Conference, Congress has already established a procedure for handling such complicated litigation through their transfer to a single district for pre-trial purposes (28 U.S.C. § 1407). Additionally, a committee of the Judicial Conference has approved the *Manual for Complex and Multi-District Litigation* to guide the district courts in their disposition of such cases. These procedures are currently being followed by Judge Real in the 17 cases assigned to him. Plaintiffs' attempt to substitute this original case for those proceedings, in which many States are named parties and all are members of the described classes, does not solve any of the problems or eliminate any of the difficulties which confront courts in such mass litigation; it would merely transfer them to this Court.

4. There is No Public Need for the Exercise of This Court's Original Jurisdiction.

Plaintiffs' insistence that the urgency of the air pollution problem requires immediate resort to the original jurisdiction of this Court completely disregards both the consent degree obtained in the Government case and the pervasive legislative and regulatory controls designed to reduce vehicle emissions. No reasonable argument can be advanced as to why this Court should extend its jurisdiction to a highly technical and complicated field presently subject to legislative and administrative regulation.

To whatever extent a negative injunction against continuation of alleged improper joint conduct is requested, such an injunction has already been entered in the Government's antitrust case, and plaintiffs do not allege that defendants are not fully complying with that decree.

The mandatory injunctive relief sought by plaintiffs infringes upon an area already subjected by Congress to comprehensive and vigorous Federal regulation.[21] Stringent emission standards have been applicable to new motor vehicles sold in the United States since late 1967, and more stringent standards for future models are presently under consideration by the Department of Health, Education and Welfare. The effect of this regulation has been to lower the quantity of automobile emissions; further reductions will result as the proportion of post-1967 cars increases and the authorized level of motor vehicle emissions is reduced. Plaintiffs do not assert that defendants are not or will not continue to be in compliance with the Federally prescribed standards. Insofar as the prayers for relief request the Court to set standards for emissions for new motor vehicles, they raise a conflict with the Federal agency charged by Congress with precisely this same task. Since the Senate has passed a bill providing for Federal pre-marketing certification of devices for used cars as well, a similar conflict may also arise as to the prayer for relief for such cars. H. R. 17255, § 211, 91st Cong., 2d Sess.

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[21] Paragraph 2 of the prayer for relief (*supra*, pp. 9-10) would require this Court to determine whether defendants were developing fully effective pollution control devices or pollution free engines by the "earliest feasible date." This would require this Court to exercise supervision of the various matters of policy and technical complexity which Congress has committed to the Secretary of Health, Education and Welfare.

In urging this Court to invoke its original jurisdiction, plaintiffs inexplicably neglect not only the extensive federal regulation but also the important role assigned to states and local governments under the provisions of the Air Quality Act of 1967 (81 Stat. 485, 42 U.S.C. § 1857, *et seq.*) in the control of pollution from all sources. The pattern of that statute is to require the states to adopt air quality standards and plans to implement those standards, subject to review by the Department of Health, Education and Welfare. 42 U.S.C. § 1857(d). Such plans would necessarily cover the entire range of sources of emissions into the atmosphere, including power plants, furnaces, factories and refineries, as well as used automobiles. As a part of this scheme, Congress explicitly preserved the power of states and local governments to regulate the "use" and "operation" of motor vehicles on their highways and thus, *inter alia,* to prescribe emission standards for used cars manufactured before the Federal standards were applied. See pp. 4-5, *supra.* The states may require installation of the prescribed devices whenever a used car is sold, as California has done,[22] or they may require all used cars to comply with prescribed standards. However, no state has made exhaust emission control devices or systems mandatory on all used vehicles.[23] The failure and apparent reluctance of these plaintiffs and other States to invoke their legislative and administrative power to deal with the used car emission problem hardly squares with their effort to invoke the original jurisdiction of this Court on the basis of a need for immediate action.

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[22] California Health and Safety Code, § 39129(d).

[23] No legislative body has attempted to compel the automobile manufacturers to install devices on used cars at their own expense, as the plaintiffs are requesting. Such a requirement would in no way relate to the restoration of competition in anti-pollution equipment (even if it be assumed that competition was previously cur-

In the final analysis it seems clear that the control of vehicle emissions raises technical and policy issues best reserved for legislative and administrative decision. The determination of what emission standards should be adopted for motor vehicles requires knowledge of the effects on health and property of emissions into the air of many chemical ingredients, which vary from place to place, and of the physical and economic feasibility of various kinds of mechanical and chemical devices for achieving these standards. Consideration must be given to the problems which result from the production of all forms of energy through the combustion of fuels. The benefits from the increased production of energy in areas of concentrated population cannot be achieved without cost, in the form of emissions into the air or the financial burden of reducing them. The process of regulation requires a balancing of all these factors, taking into account the possibility of harm from different levels of discharge of substances into the atmosphere and the cost of different levels of controls.

The Air Quality Act provides a legislative framework for the resolution of these issues in the context of the national and regional ambient air quality standards to be prescribed thereunder. This Court has made it clear that courts should not substitute their views for those of administrative agencies on such matters of public policy, technology and economics. Cf. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64-65 (1956); *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 767 (1947); *Pan*

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tailed). The defendants would, of course, have taken into account the cost of such devices when setting the prices of their cars if the devices had been installed during the process of manufacture. To subject them to the cost of such retrofitting on perhaps 70 million automobiles, in amounts undoubtedly exceeding a billion dollars, without being able to charge for the equipment installed, would clearly be punitive and confiscatory.

American World Airways v. *United States*, 371 U.S. 296, 303 (1963). In any event, such matters are not suitable for determination by this Court in the first instance, without the benefit of the factual and legal exploration and sifting that can be given to these complex and technical subjects in the district courts and the courts of appeals.

CONCLUSION

For all of the above reasons this case is clearly not an appropriate one for the exercise of this Court's original jurisdiction. Leave to file the complaint should, therefore, be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 12 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of The United States

October Term, 1970

No. 45 Original

Supreme Court, U. S.
FILED
APR 24 1972
MICHAEL RODAK, JR., CLERK

STATE OF WASHINGTON, STATE OF ILLINOIS, STATE OF ARIZONA, STATE OF COLORADO, STATE OF HAWAII, STATE OF IOWA, STATE OF KANSAS, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF OHIO, STATE OF RHODE ISLAND, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,

Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, a Delaware corporation, FORD MOTOR COMPANY, a Delaware corporation, CHRYSLER CORPORATION, a Delaware corporation, AMERICAN MOTORS CORPORATION, a Maryland corporation, and AUTOMOBILE MANUFACTURERS ASSOCIATION, a New York corporation,

Defendants.

MOTION FOR ORDER OF COURT GRANTING LEAVE TO PETITIONER TO JOIN CAUSE AS PARTY PLAINTIFF

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IN THE

Supreme Court of The United States

October Term, 1970

No. 45 Original

STATE OF WASHINGTON, STATE OF ILLINOIS, STATE OF ARIZONA, STATE OF COLORADO, STATE OF HAWAII, STATE OF IOWA, STATE OF KANSAS, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF OHIO, STATE OF RHODE ISLAND, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,
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vs.

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Defendants.

MOTION FOR ORDER OF COURT GRANTING LEAVE TO PETITIONER TO JOIN CAUSE AS PARTY PLAINTIFF

THE STATE OF WEST VIRGINIA, a sovereign State of the United States of America, by and through its Attorney General, petitions the Court for an Order granting the State of West Virginia leave to join as a party plaintiff in the above-entitled cause, and for leave to adopt, endorse and reaffirm the Motion for

Leave to File Complaint, Brief in Support thereof, and Complaint heretofore filed in this cause by plaintiff, and states herein, and in support thereof asserts that the right to the relief sought by the State of West Virginia is the same as that which is sought in this proceeding by the States of Washington, Illinois, Arizona, Colorado, Hawaii, Iowa, Kansas, Maine, Massachusetts, Minnesota, Missouri, Ohio, Rhode Island, Vermont and Virginia, co-plaintiffs in this cause and concerns the same occurrences and presents common questions of law and fact.

Respectfully submitted,

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FILE COPY

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IN THE

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STATE OF MINNESOTA, STATE OF MISSOURI,
STATE OF OHIO, STATE OF RHODE ISLAND,
STATE OF VERMONT, AND COMMONWEALTH OF VIRGINIA,
Plaintiffs,

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GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland corporation, and
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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SUBJECT INDEX

	Page
Introduction	1
I. There Is No Suitable Alternative Forum to Which This Case Could Be Remitted in the Interests of Convenience, Efficiency and Justice	2
A. There Is No Suitable Alternative Forum in Respect to Count I	4
B. There Is No Suitable Alternative Forum in Respect to Count III	8
(1) A Federal District Court could in its discretion decline pendent jurisdiction	8
(2) Plaintiff States have a right to a federal forum in respect to Count III	10
(3) Even if plaintiff States were not entitled to a national tribunal for Count III, no single state court could adjudicate Count III	12
C. No Other Forum Can Expedite This Case as Efficiently	12
II. This Court Is Not Precluded From Proceeding in This Case Because of Concurrent Legislative or Administrative Activity	14
Conclusion	17
Appendices:	
Appendix 1	A-1
Appendix 2	A-6

TABLES OF AUTHORITY

Table of Cases

Arctic Maid v. Territory of Alaska, 297 F.2d 28 (9th Cir., 1961)	11
Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804)	10
Engle v. Scott, 57 Ariz. 383, 114 P.2d 236 (1941)	12
Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945)	3, 4, 10

Page

Hawaii v. Standard Oil Co., No. 24,603 (9 Cir., Sept. 25, 1970) 6

Hymer v. Chai, 407 F.2d 136 (9th Cir., 1969) 9

Krisel v. Duran, 386 F.2d 179 (2d Cir., 1967), cert. denied, 390 U.S. 1042 (1968) 11

Ladew v. Tennessee Copper Co., 179 Fed. 245 (C.C.D., Tenn.), aff'd 218 U.S. 357 (1910) 12

Louisville & Nashville R. R. v. Mottley, 211 U.S. 149 (1908) 10

Mississippi and M.R. Co. v. Ward, 67 U.S. (2 Black) 485 (1862) 12

People v. City of St. Louis, 10 Ill. 351 (1848) 12

People ex rel. Cunningham v. Lewis, 43 Ill. App.2d 295, 193 N.E.2d 473 (1963)..... 12

State v. Reynolds, 113 Ohio App. 469, 178 N.E.2d 842 (1960)..... 12

United Mine Workers v. Gibbs, 383 U.S. 715 (1966)....8, 9

Williams v. United States, 405 F.2d 951 (9th Cir., 1969) 9

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888) 11

Constitutional Provisions

United States Constitution, Article III, Section 2.....10, 12

Statutes

Air Quality Act, 1967 15

Baldwin's Ohio Revised Code Ann., Ch. 3707.01, 3707.51 12

Clayton Act, Section 16 2

Kansas Statutes Ann., 1964 §60-908 12

National Emission Standards Act, 1965 15

Page

Sherman Act 2, 10

28 U.S.C. §1292(b) 6

28 U.S.C. §1407 4

T.18 Vermont Statutes Ann., §610 12

West Virginia Code, §20-5A-17 12

Annotations & Textbooks

7 A.L.R.2d 473 (1949) 12

Hart and Wechsler, *The Federal Courts and The Federal System*, 23-24 (1953) 11

68 Mich. L. Rev. 1083 15

11 Stan. L. Rev., 665, N. 131 (1966) 11

Other Authority

Federal Rules of Civil Procedure, Rule 12(h)(3) 10

Hamilton, Federalist, No. 80 11

Report of the Committee on Public Works of the United States Senate on the National Air Quality Standards Act of 1970 13-14

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STATE OF WASHINGTON, STATE OF ILLINOIS,
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STATE OF MINNESOTA, STATE OF MISSOURI,
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Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland corporation, and
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

INTRODUCTION

The issues before this Court are narrow. Defendants do not dispute the right of the seventeen plaintiff States[1] to bring this action as *parens patriae* of their citizens and as

1. Since the complaint was filed two additional states, North Dakota and West Virginia, have filed motions for leave to join as additional parties plaintiff, making a present total of seventeen plaintiff States.

proprietors, nor do the defendants contend that the States have failed to state a case which comes within this Court's original jurisdiction. Defendants simply urge this Court to withhold the exercise of its jurisdiction because, defendants assert, plaintiffs have a suitable alternative forum or forums in other courts (Def. Br. 2, 11-20). Defendants further challenge the need for and the appropriateness of the relief sought by plaintiff States on the ground that other branches of the Federal Government (specifically the Congress and the Executive) are presently regulating motor vehicle emissions which cause air pollution (Def. Br. 2, 4, 20-24). Accordingly this reply brief will be limited to those two points.

I. There Is No Suitable Alternative Forum to Which This Case Could Be Remitted in the Interests of Convenience, Efficiency and Justice

Defendants urge this Court to withhold the exercise of its jurisdiction in this case on the ground that there is no want of other suitable forums (Def. Br. 11). Yet defendants are unable to indicate any *one* alternative forum which they can say with certainty will adjudicate this case on all three counts. Unless a single federal district court agreed in its discretion to hear Count III on the basis of pendent jurisdiction, see *infra* at pp. 8-10, defendants' proposed alternative would split this case, with Count I (and probably Count II[2]) tried in a single federal district

2. Count II differs from Count I only in that it alleges that the pertinent facts constitute a violation of the common law against restraints of trade as distinguished from the Sherman Act. It was included as a safeguard against an argument, previously made by these defendants in the multidistrict cases, that the power of a federal court to grant equitable relief pursuant to Section 16 of the Clayton Act is less broad than the general equity powers of such a court.

court and Count III tried as seventeen separate nuisance actions in the state courts of the seventeen plaintiff States (Def. Br. 11).

Such a result is not in the interest of convenience, efficiency or justice, and is not what this Court intended when referring to those standards it exercised its original jurisdiction in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

To the contrary, the action taken by this Court in *Georgia v. Pennsylvania R. Co., supra,* together with the clear language of the majority opinion show that this Court will not strain reality to avoid the exercise of its original jurisdiction in cases where a State has stated a cause of action against citizens of another State and is otherwise properly before this Court.

Recognizing the original jurisdiction of this Court as "one of the mighty instruments which the framers of the Constitution provided so that adequate machinery might be available for the peaceful settlement of disputes between states and between a state and citizens of another state," 324 U.S. at 450, the court stated:

> . . . Once a state makes out a case which comes within our original jurisdiction, its right to come here is established. There is no requirement in the Constitution that it go further and show that no other forum is available to it. 324 U.S. at 466

The defendants urge that in the *Georgia* case, "the court left little doubt that if plaintiffs could have obtained jurisdiction over the defendants in a single district, a denial of leave to file would have been 'wholly appropriate'" (Def. Br. 12). But the language on which defendants rely to support their argument is extracted from the dissent, not

from the opinion of the Court (Def. Br. 12, 14-15). Moreover, the point made by Chief Justice Stone in his dissent, 324 U.S. at 471-472 (that facts of which the Court could take judicial notice showed that there was no want of a suitable forum in which Georgia could reach the same number of defendants as she could sue in the Supreme Court), demonstrates that in appropriate cases this Court will exercise its original jurisdiction without an exhaustive search for suitable alternative forums.

A. *There Is No Suitable Alternative Forum in Respect to Count I.*

In suggesting that Count I could be filed by agreement of the seventeen plaintiff States in a single federal district court, defendants have overlooked the problems presented by pending anti-trust litigation involving Multidistrict Vehicle Air Pollution Control Equipment, problems clearly perceived by Judge Manuel L. Real, the United States District Judge to whom the multidistrict private civil treble damage anti-trust litigation involving motor vehicle air pollution control equipment MDL District No. 31 has been assigned pursuant to 28 U.S.C., §1407. As stated by the defendants, in addition to the instant case, there are presently pending a series of seventeen private anti-trust suits filed in district courts in Illinois, California, Pennsylvania, New York, Wisconsin and Minnesota. If Count I of this lawsuit were filed in a federal district court, it would be consolidated for pre-trial proceedings before Judge Real, and be simply the eighteenth private case so filed.

In his memorandum order dated September 4, 1970

(Re Motion to Dismiss)* Judge Real expressly recognized that "The function of the judge assigned cases pursuant to Title 28, United States Code, Section 1407, is to coordinate pre-trial proceedings *with the view of returning cases to the transferor judge in condition to be tried* expeditiously to the benefit of all parties to the litigation" (Memo Order p. 4). (Emphasis supplied).

Thus, as Judge Real states and as plaintiffs have pointed out in their opening brief, there is presently no existing mechanism in our judicial system for the unified *trial* of the factual issues presented by the pending multidistrict cases.

In another memorandum order, also dated September 4, 1970, (Re Class Actions) Judge Real stated in respect to the cornerstone issue of conspiracy:

> . . . certainly the question of conspiracy is one which, as alleged herein, is common not only to the class within each separate action but also to all of the actions filed. This is an issue which should, in the interests of justice, need be litigated only once. Memorandum Order (Re Class Actions, p. 4).

But how, other than by this Court exercising its original jurisdiction, can this be accomplished? Even the defendants concede that if this Court does exercise its original jurisdiction in this case, "a decision by this Court would, as a practical matter, be controlling throughout the nation" (Def. Br. 19). The issue of conspiracy alleged in Counts I and II of the complaint is the same conspiracy alleged in the seventeen pending separate private treble damage actions. The appropriateness and feasibility of

*The Memorandum Orders of Judge Real referred to in this brief are printed as appendices.

equitable relief sought in this case is similarly an issue in sixteen of the other seventeen cases. These are the factual and legal issues on whose determination the outcome of all this litigation turns. They are the time consuming issues, the issues of universal national significance. The remaining questions of impact in individual states and communities and the measure of monetary damages, if any, are ones which may well in the interests of efficiency be tried separate from the principal factual and legal issues in any event.[3]

If this Court views the instant case in isolation rather than in the context of pending motor vehicle pollution control litigation, and if it separates Counts I and II from Count III, neither of which should be done, it could perhaps be argued, as defendants have attempted to do, that, in balance, convenience, efficiency and justice could be better served if plaintiffs were to file Counts I and II of this action in a single federal district court. However, such an argument ignores the pendency of other similar cases in various federal districts. When those other cases are taken into consideration, it is apparent that, in balance, a trial in this Court before a master is better adapted to a final resolution of the issues presented than those of a single district court which would have no binding effect upon other pending cases. Moreover, in light of the motion which these defendants filed on October 15, 1970 in the multidistrict litigation for reconsideration of Judge Real's order denying their motion to dismiss or in the alternative to certify for interlocutory appeal under 28 U.S.C. 1292(b),

3. Furthermore, the recent decision of the United States Court of Appeals for the Ninth Circuit in *Hawaii v. Standard Oil Co.*, No. 24,603 (9 Cir. Sept. 25, 1970) may make the *parens patriae* claims for monetary damages moot.

their argument that "trial under such a procedure might be slower, since this Court might have to rule on interlocutory matters which would not ordinarily be presented to an appellate body" (Def. Br. 17) has a hollow ring. It is apparent that whether these cases are litigated in the district courts or in this Court, interlocutory review and *certiorari* are going to be the rule, not the exception.

Certainly the standards of convenience, efficiency and justice apply not only to the individual parties to the particular cases before this Court but more broadly to the resolution of the issues presented by that case. As Judge Real has pointed out, the overreaching factual question of conspiracy is an issue which should be litigated only once in the interests of justice. Yet, unless this Court exercises its original jurisdiction in this case or unless all the parties in existing multidistrict cases agree to be bound by the findings of fact or jury verdict in the first case to be tried, that issue will be tried a number of times.

Neither *res judicata* nor collateral estoppel would apply to a State or other plaintiff not a party to the action which was actually tried. Moreover, rulings on questions of law and admissibility of evidence rendered by a federal district trial judge would in no way be controlling on the parties in other pending cases. However, not only would a trial of the conspiracy issue in this Court be controlling throughout the nation as a practical matter but all rulings on questions of law including admissibility of evidence would be legally binding. Defendants urge that such a result "would be true in any kind of case the Court might be willing to hear originally" but the need for such a result in the interests of efficiency and justice is unlikely to arise frequently.

If, contrary to expectation, similar cases do arise in the future, Congress can act to provide at a lower court level the type of judicial mechanism which today only this Court's original jurisdiction can afford. At the present time in the interests of convenience, efficiency and justice there is no suitable alternative forum for the resolution of the issues raised by Count I alone, *a fortiori* by the case in its entirety.

B. *There Is No Suitable Alternative Forum in Respect to Count III.*

(1) A Federal District Court could in its discretion decline pendent jurisdiction

Defendants state that "if the nuisance and anti-trust claims are found to be derived 'from a common nucleus of operative fact' (*United Mine Workers v. Gibbs*, 383 U.S. at 725), a federal court having jurisdiction over the anti-trust charges could also have pendent jurisdiction over the nuisance claim" (Def. Br. 13). Defendants rightfully hedge by using the word "if." They do not know whether a federal court in the future would find such a common nucleus or, even then if it would in its discretion exercise pendent jurisdiction. Defendants do not attempt to demonstrate that there is such a common nucleus under the *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), test.

It should be clear to defendants, as it is to this Court, that the principles which permit and encourage joinder of claims where a court has jurisdiction of all claims joined, are totally different from the principle enunciated in *United Mine Workers v. Gibbs, supra*, which enables a court in its discretion to exercise jurisdiction which it does not independently possess.

Even if a persuasive argument could be made that Counts I and III have the required common nucleus of operative fact, something the defendants never demonstrate, defendants' pendent jurisdiction argument facilely overlooks the fact that the federal judicial doctrine of pendent jurisdiction is one of discretion and that accordingly, pendent jurisdiction may be declined by a federal court, even in a case which might be appropriate for the exercise of such pendent jurisdiction. *United Mine Workers v. Gibbs,* 383 U.S. 715 at 726 (1966).

If the present plaintiffs were to file this suit in a federal district court, it would be transferred to the Central District of California and consolidated for discovery purposes with the presently pending Multidistrict Vehicle Air Pollution Control Equipment litigation. Thus preliminary questions on pendent jurisdiction would be considered by the California District Court, and on appeal by the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit, in particular, has taken a narrow view of the scope of pendent jurisdiction and has refused to exercise such jurisdiction in a number of cases. See, *e.g., Hymer v. Chai,* 407 F.2d 136 (9th Cir. 1969); *Williams v. United States,* 405 F.2d 951 (9th Cir. 1969).

What the defendants are really doing is asking this Court to predict that some federal court in the future would exercise pendent jurisdiction over Count III. Such a petition is not equivalent to finding a suitable alternative forum.

Finally, it should be noted that while defendants now suggest that federal pendent jurisdiction as to the nuisance claim exists, their suggestion in no way binds them or af-

fects any later decision on this issue, should there be one, by a federal court. It is unlikely that defendants would seek to agree to such pendent jurisdiction if and when the time for decision should arise, but even if they would, such an agreement would be without meaning. Parties cannot stipulate to the subject matter jurisdiction of a federal court. See, *e.g.*, FED. R. CIV. P. 12(h)(3); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

Clearly, if a federal court does not exercise pendent jurisdiction over Count III, there is no other single forum where this suit can be brought.[4] Surely where this Court refused to remit the State of Georgia to a federal district court despite the facts pointed out by Chief Justice Stone in his dissent, *Georgia v. Pennsylvania R. Co.*, 324 U.S. at 471-472, it should not remit the seventeen States who are plaintiffs herein to a federal district court on the mere hope that that federal district court would in its discretion accept jurisdiction of the entire case.

(2) Plaintiff States have a right to a federal forum in respect to Count III

Defendants apparently admit that unless a district court exercises pendent jurisdiction over Count III, plaintiff States would not have an alternative federal forum for Count III. But defendants are fundamentally wrong in stating that plaintiffs' argument that they are entitled to a federal forum is a "novel suggestion." (Def. Br. 14).

To the contrary one of the specific purposes of Article III, Section 2 of the Constitution was to furnish a national

4. Just as no other federal court has independent jurisdiction over Count III, so no state court has jurisdiction over Count I, the Sherman Act claim.

tribunal to states suing citizens of another state. As the court stated in *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888):

> As to "controversies between a State and citizens of another State." The object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist, No. 80; Chief Justice Jay, in *Chisholm v. Georgia*, 2 Dall. 419, 475; Story on the Constitution, §§1638, 1682.

In Federalist, No. 80, Alexander Hamilton stated:

> . . . the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

See also *Hart and Wechsler, The Federal Courts and The Federal System*, 23-24 (1953); Comment, *The Original Jurisdiction of The United States Supreme Court*, 11 *Stan. L. Rev.*, 665 at 684, N. 131 (1966).

Since a State is not a citizen for diversity purposes, *Arctic Maid v. Territory of Alaska*, 297 F.2d 28 (9th Cir. 1961); *Krisel v. Duran*, 386 F.2d 179 (2d Cir. 1967), cert. denied, 390 U.S. 1042 (1968), the original jurisdiction of this court is the only federal forum available to plaintiffs in respect to Count III.

(3) Even if plaintiff States were not entitled to a national tribunal for Count III, no single state court could adjudicate Count III

Count III states a claim against the defendants for creating and maintaining a public nuisance. In state courts, nuisance actions are generally treated as local actions which must be brought in the district where the nuisance is to be abated. See, e.g., *Ladew v. Tennessee Copper Co.*, 179 Fed. 245 (C.C.D. Tenn), aff'd 218 U.S. 357 (1910); *Engle v. Scott*, 57 Ariz. 383, 114 P.2d 236 (1941); *Mississippi and M.R. Co. v. Ward*, 67 U.S. (2 Black) 485 (1862); *State v. Reynolds*, 113 Ohio App. 469, 178 N.E.2d 842 (1960); *People v. City of St. Louis*, 10 Ill. 351 (1848); *People ex rel. Cunningham v. Lewis*, 43 Ill. App. 2d 295, 193 N.E.2d 473 (1963). Annotation, *Venue of Suit to Enjoin Nuisance*, 7 A.L.R.2d 473 (1949).

A number of the plaintiff States have statutes to the same effect. See, *e.g.*, Kansas Statutes Ann. 1964, §60-908; West Virginia Code, §20-5A-17; Baldwin's Ohio Revised Code Ann., Ch. 3707.01, 3707.51; T.18 Vermont Statutes Ann., §610.

If Count III would have to be brought in seventeen different state courts by each of the seventeen plaintiff States, then it cannot be said that there is *a* suitable alternative forum, even in state court.[5]

C. *No Other Forum Can Expedite This Case As Efficiently.*

The defendants make no answer to the compelling con-

5. Possibly all seventeen plaintiff States could sue to enjoin the alleged nuisance in state court in Michigan, the home state of the defendants. That is precisely the type of situation which Article III, section 2 was designed to avoid. See *supra* at p. 11.

sideration of time in this case. In view of their decision to seek interlocutory appeal, it is clear that bypassing the Court of Appeals will save considerable time as this case progresses.

The need for prompt relief, if plaintiffs can prove their case, has been made even more apparent by recent findings set forth in the Report of the Committee on Public Works of the United States Senate on the National Air Quality Standards Act of 1970, dated September 17, 1970.

The report states:

> Based on data contained in air quality criteria documents already issued (for carbon monoxide and photochemical oxidants) or in preparation (for nitrogen oxides) and on requirements for margins of safety, it has been concluded that the following ambient air quality levels must be attained to insure protection of public health:
>
> Carbon monoxide, 9 ppm/8-hour average.
>
> Photochemical oxidants, 0.06 ppm/1-hour average.
>
> Nitrogen dioxide, 0.10 ppm/1-hour average.

It then lists the following statistics showing present maximum ambient air levels related to direct health effects.

> Carbon monoxide: 44 parts per million/8-hour average, Chicago.
>
> Nitrogen dioxide: 0.69 parts per million/1-hour average, Los Angeles.
>
> *Maximum Ambient Air Levels of Oxidant Precursors*
>
> Hydrocarbons: 5.3 parts per million/6 to 9 a.m. average, Los Angeles.
>
> Nitrogen dioxide: 0.62 parts per million/6 to 9 a.m. average, Los Angeles.
>
> (These hydrocarbon and nitrogen dioxide measure-

ments are associated with Los Angeles peak values for oxidants.)

The report then states that under existing law the health related air quality levels could be attained in *1990* if all new cars produced after 1980 achieved the calculated emission-reduction goals. Senate Report, NAQSA of 1970, S. 4358, pages 25-27.

Existing legislation does not propose standards for pre-1968 vehicles, and even the bill presently in conference committee does not apply its mandatory standards for cars prior to the 1975 model. If the defendants did as alleged conspire to suppress technological development, a fact not before the Congress now nor when it enacted the existing air quality laws, plaintiff States will be entitled to equitable relief which could, if shown to be feasible, achieve the health related air quality levels well in advance of 1990. The time saving which this Court's exercise of its original jurisdiction can effect is essential to complete relief in this case.

II. This Court Is Not Precluded From Proceeding in This Case Because of Concurrent Legislative or Administrative Activity

Defendants devote a substantial portion of their brief (pp. 18, 20-24) to the argument that no court should hear this case or grant the equitable relief sought by the plaintiff States because the subject of motor vehicle air pollution is more appropriate for legislative and administrative controls and because Congress and the Department of Health, Education and Welfare are presently engaged in evolving standards and imposing such controls. In short, defendants imply that the area has been "preempted," and that courts

in the exercise of their equitable powers should not enter it. Defendants' argument is not well taken.

The present federal legislation on the subject is the National Emission Standards Act, enacted in 1965, and amended by the Air Quality Act of 1967. Under that law, the federal standards apply only to 1968 and later models. In no way does existing federal law prevent a state from requiring that 1967 and earlier model cars be equipped with pollution control equipment. See Currie, "Motor Vehicle Air Pollution: State Authority and Federal Pre-Emption," 68 Mich. L. Rev. 1083, at 1095. Thus, even if defendants' "preemption" argument were applicable to this legal action by the States, it would not affect the equitable relief sought in respect to pre-1968 vehicles. The fact is, however, that the argument is totally inappropriate. There is no showing that the standards enacted or presently under consideration by Congress will eliminate motor vehicle produced air pollution as effectively and as quickly as one or more of the defendants could have done but for the conspiracy alleged in the complaint.

It should be clear on the face of the complaint that plaintiff States are not asking this Court to invade a field reserved more properly for Congress or the Executive.

The equitable relief which plaintiff States seek is designed only to remedy the damage caused now and in the future by defendants' alleged violations of law.

Plaintiffs allege that the defendants conspired and agreed to eliminate all competition among themselves in the research, development, manufacture and installation of Motor Vehicle Air Pollution Control Equipment, thus causing hindrance and delay in the research, development,

manufacture and installation of such Motor Vehicle Air Pollution Control Equipment (Complaint, par. 16(a), 18(a)). Plaintiff States allege they have no adequate remedy at law through monetary damages (Complaint, par. 18(1)). Accordingly, plaintiff States seek the only type of relief which can repair the damage caused by the alleged conspiracy, namely a decree requiring defendants to adopt a program of accelerated spending and research which will produce effective pollution control equipment or a "clean" engine by that date on which such equipment or engine would have been produced by one or more of the defendants but for the conspiracy alleged in the complaint, and to install such equipment at defendants' cost, on all cars manufactured by defendants back to the date when such equipment would have been available but for the conspiracy. The purpose of such equitable relief is clearly to give plaintiff States and their citizens the pollution-reduced or pollution-free motor vehicles which would have been available but for the conspiracy. Whether and to what degree such relief is feasible can only be determined when all the evidence necessary to the fashioning of such a decree is before the Court. To challenge a decree directly fashioned to remedy the damage allegedly done at this time is premature and unwarranted. For purposes of defeating defendants' argument, it is enough to show that the equitable relief sought is designed to remedy damage caused by defendants' alleged violation of the anti-trust laws, a subject which Congress was in no way concerned with in providing Motor Vehicle Emission Standards.

Defendants made the same argument in respect to the equitable relief sought by plaintiffs in the Multi-district

cases. Judge Real disposed of that argument summarily, stating *inter alia*:

> Plaintiffs may fail in their proof, but until then they should be given the benefit of employing "any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). Memo Order (Re Motion to Dismiss) p.3.
>
> It may well be that a trial judge, after hearing the evidence may determine that the grant of an injunction which parallels the relief of the consent decree in action 69-75-JWC is unwarranted. But pre-judging at this stage of the litigation, that plaintiffs may not be able to present some peculiar need for further injunctive relief is not the function of this Court. The prayers for relief are within the jurisdiction of this Court grant given the proof of facts alleged. Whether it is necessary or desirable is for the trial judge or development of these cases to where they may be subject to disposition without trial. Memo Order (Re Motion to Dismiss) p. 4.

This Court should dispose of defendants' argument as readily as did Judge Real.

CONCLUSION

For the reasons stated in plaintiffs' opening brief and in this reply brief, this Court should exercise its original jurisdiction and grant the plaintiff States leave to file their complaint.

Respectfully submitted,

DATED: November 2, 1970

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APPENDIX 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: MULTIDISTRICT PRIVATE CIVIL TREBLE DAMAGE ANTITRUST LITIGATION INVOLVING MOTOR VEHICLE AIR POLLUTION CONTROL EQUIPMENT	M.D.L. Docket No. 31 Memorandum Order (Re Motion to Dismiss)

Defendants have brought motions to dismiss 15 of the 16 complaints filed in this matter. Defendants have classified the grounds as 1. No Antitrust Injury; 2. No Parens Patriae Claims; 3. No Injunctive Relief; and 4. The Handy Complaint and they will be dealt with herein in that order.

BACKGROUND

January 10, 1969 the United States of America filed its complaint alleging against the major defendants herein violation of Section 1 of the Sherman Act (15 U.S.C. §1). The acts of conspiracy alleged therein are, without change, the acts alleged in the actions herein. The action by the United States resulted in a consent decree approved by Judge Jesse W. Curtis of the Central District of California in *United States of America v. Automobile Manufacturers Association, Inc., et al.*, No. 69-75-JWC.

The conspiracy enjoined in the consent decree includes as pertinent to the actions filed herein:

1. To prevent, restrain or limit the development, manufacture, installation, distribution or sale of air pollution control equipment for motor vehicles;

2. Adhering to agreements with reference to patents and patent rights.

After attempts to intervene in action No. 69-75-JWC met with failure, actions have been filed by plaintiffs herein variously in individual, class and parens patriae capacities.

ANTI-TRUST INJURY

Title 15, United States Code, Section 1, provides in its pertinent part:

> "§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty. Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

Title 15, United States Code, Section 15 provides in its pertinent part:

> "§15. Suits by persons injured; amount of recovery. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Defendants' thrust upon the motion to dismiss is that there is not alleged, nor can there be alleged a "commercial relationship" between plaintiffs and defendants permitting compensation for the claimed damages. For purposes of the motion to dismiss the court must assume the "injury" alleged.[1]

In terms of the development of the antitrust laws, the concept of source of injury alleged herein is rather new. It was not until 1947, that any recognition of pollution as anything more than a seasonal and infrequent nuisance like hay fever or summer cold came to the public of the United

States. It was not until 1952, that any claim was laid at the door of the automobile industry and not until 1969, that anyone recognized that allegedly something could be done about it except for the conspiracy of defendants alleged in action No. 69-75-JWC. We are now concerned with the phrase "injured in his business or property *by reason of anything* forbidden in the anti-trust laws" in the light of the allegations of these complaints, rather than the traditional, legalistic approach defined by the cases cited by defendants in their motion to dismiss. Each of the plaintiffs allege injury to their respective business or property *by reason* of anti-trust violations of the defendants.

Plaintiffs may fail in their proof, but until then, they should be given the benefit of employing "any available remedy to make good the wrong done."[2]

PARENS PATRIAE CLAIMS

The status of parens patriae cannot be used to substitute for a class action as to individual claims of the residents of political subdivision.

The question of validity of the parens patriae suit as applied to the economy of the governmental entities herein is answered in *State of Georgia v. Pennsylvania Railroad Company*, 324 U.S. 439 (1944) and *State of Hawaii v. Standard Oil Company of California*, 301 F. Supp. 982 (D. Hawaii, 1969) and needs no amplification here.

INJUNCTIVE RELIEF

The function of the judge assigned cases pursuant to Title 28, United States Code, Section 1407, is to coordinate pretrial proceedings with the view of returning cases to

the transferor judge in condition to be tried expeditiously to the benefit of all parties to the litigation. Defendants' attack upon the prayer for injunctive relief in 14 of the 15 complaints to which the motion to dismiss has been addressed is, at this point in this litigation, premature.

The Court has not been advised nor can it conjure any situation in which discovery will be delayed or, more onerous, simply because of the request for additional relief by way of injunction, prohibitory or mandatory.

It may well be that a trial judge, after hearing the evidence may determined that the grant of an injunction which parallels the relief of the consent decree in action 69-75-JWC is unwarranted. But pre-judging at this stage of the litigation, that plaintiffs may not be able to present some peculiar need for further injunctive relief is not the function of this Court. The prayers for relief are within the jurisdiction of this Court grant given the proof of facts alleged. Whether it is necessary or desirable is for the trial judge or development of these cases to where they may be subject to disposition without trial. We have not yet reached that posture of the cases. If we ever do depends upon the parties.

THE HANDY COMPLAINT

Defendants' motion to dismiss attacks Count II of the Handy complaint. Count II alleges violation of "plaintiffs' right to clean air and to a safe and healthy environment, free from the contaminants and pollutants which have resulted, and continue to result, from the operation of automotive vehicles, and the use therein of gasoline, which vehicles and gasoline were, and still are, manufactured,

distributed and sold by defendants," all protected by the Fifth, Ninth, Tenth and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, Section 1983 and Section 1988 (Civil Rights Act).

Plaintiff Handy would have this Court establish a right to clean air and a safe and healthy environment within the penumbra of the United States Constitution and its amendments. Clearly no extensions have been made by the courts except where there has been governmental intrusion into the privacy of its citizens.

The invitation to the Court to now rule that private corporations, though drawn to gigantic proportions, are public utilities or have the functions of a government is declined. These constitutional and statutory provisions do not create or permit any cause of action for a solely private intrusion.

Dated: September 4, 1970.

MANUEL L. REAL
United States District Judge

FOOTNOTES

1./ *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir., 1967); *Knuth v. Erie-Crawford Dairy Coop. Association*, 395 F.2d 420 (3d Cir., 1968).

2./ *Bell v. Hood*, 327 U.S. 678, 684 (1946); *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

APPENDIX 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: MULTIDISTRICT PRIVATE CIVIL TREBLE DAMAGE ANTITRUST LITIGATION INVOLVING MOTOR VEHICLE AIR POLLUTION CONTROL EQUIPMENT	M.D.L. Docket No. 31 All Cases Except Sturtz v. General Motors Memorandum Order (Re Class Actions)

The propriety of the maintenance of class actions or class action claims is questioned by defendants in 15 of the 16 cases pending before this Court for consolidated pre-trial proceedings.

The broadest claims of class representation are found in the *Gorssman, Philadelphia, Lackawanna* and *Handy* complaints.[1] These complaints purport to represent all persons in the United States.

The *Morgan* case[2] alleges class claims by all the farmers of the United States.

Complaints of *Illinois, New Jersey, New Mexico, Connecticut* and *Wisconsin*[3] claim classes of all people within their respective states and their political subdivisions.

Political subdivisions, public corporations and authorities within the state are represented in the *New York* complaint.[4]

Residents are represented in the *City of New York, City and County of Denver* and *Keane* complaints.[5]

California's[6] representation is narrowed to "all persons who own property, real or personal, or who conduct a business within the State of California damaged as the result of air pollution caused by automobiles."

Each of the class actions are attacked by defendants on the failure to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Federal Rules of Civil Procedure Rule 23 provides in its pertinent part:

"Rule 23. Class Actions.

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Defendants primary attack on the class action status of this litigation is directed to the absence of common questions of law and fact which predominate over questions individual to the class members and the unmanageability of the classes alleged.

COMMON QUESTIONS OF LAW AND FACT

Classically the visceral issues of any litigation are liability on the part of a defendant and damage on the part of a plaintiff. Certainly one can, within the framework of these basic issues, conjure a plethora of factual and legal issues which must be resolved before a decision can be reached in the trial of a case. Unlike most litigation, treble damage (private) anti-trust liability presents the determination of three issues, (1) conspiracy (monopolization, etc.), (2) impact and (3) damage.[7] Certainly the

question of conspiracy is one which, as alleged herein, is common not only to the class within each separate action but also to all of the actions filed. This is an issue which should, in the interest of justice, need be litigated only once.

The instrusion of impact into the consideration of the liability aspect of these cases create a difficulty which cannot be easily answered. *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa 1968); *State of Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Water Meters*, 304 F. Supp. 873 (J.P.M.L., 1969), if they are authority for the separation of issues are clearly distinguishable. All of the cases herein allege a peculiar type of anti-trust injury, i.e., injury resulting from a pollution caused by the conspiracy to hinder and delay the research, development, manufacture and installation of effective motor vehicle air pollution control equipment. It is in effect a conspiracy to maintain a public nuisance—smog. Impact is as varied as the public itself. In *Philadelphia Electric Co. v. Anaconda American Brass Co., supra, State of Illinois v. Harper & Row Publishers, Inc., supra,* and *In Re Multidistrict Private Civil Treble Damage Antitrust Litigation Involving Water Meters, supra,* the courts are considering price fixing conspiracies in violation of the anti-trust laws—where "impact" and "buyer" become almost synonomous. If you qualify as a "buyer" of the commodity in question the liability—damage issues—except as to *amount* of damage—lend themselves to common determination.

Grossman, Philadelphia, Lackawanna, Handy, City of

New York, City and County of Denver and *Keane* cannot be maintained as class actions.

Although there may be some differences in the effect of smog on various crops or the fauna and flora of a state, political subdivision, public corporation or public authority, the pleadings as they now stand do allege a class properly represented in *Morgan, Illinois, New Jersey, New Mexico, Connecticut, Wisconsin, New York* and *California* with respect to common issues of law and fact which predominate over questions affecting only individual members.

MANAGEABILITY OF THE CLASSES

Manageability of the classes alleged herein may certainly tax the imagination and ingenuity of the litigants, counsel and the court. But until management is recognized as impossible or near impossible, the Court will depend upon the ingenuity and aid of counsel to solve the complex problems this litigation may bring. If successful, the economics of time, effort and expense will more than compensate the effort.

REPRESENTATION OF THE CLASSES

The complaints of *Illinois, New Mexico, California, Wisconsin, New York, Connecticut, New Jersey, Philadelphia* and *Lackawanna* allege representation by a governmental entity of the individual residents within its jurisdiction. Putting aside the status of parens patriae for a moment, the question raised is the adherence to the principle that a plaintiff representative must be a member of the class purportedly represented.[8] It is conceivable that a governmental agency might, with reference to a particular act or

series of acts, stand in the same position as an individual resident within its jurisdiction. But in the context of the acts alleged herein and any impact and/or damage resulting therefrom a governmental agency raises issues which are peculiar only to its status as a governmental agency. It cannot, therefore, be a member of the class of citizens or residents and cannot maintain a class action on behalf of individual plaintiffs.

The representation of governmental ageneies as a class is, of course. properly the subject of a class action. Since more than one action alleges representation of the class, determination of *the* representative governmental agency must be made. That question, or its resolution, does not at this juncture affect the proceedings herein and is left for later determination by agreement of the parties and failing that, hearing and determination by the Court.

Dated: September 4, 1970.

MANUEL L. REAL
United States District Judge

APPENDIX A

1. *Marshall B. Grossman, et al. v. Automobile Manufacturers Association, Inc., et al.* 69-1855-R

   City of Philadelphia, etc. v. Automobile Manufacturers Association, Inc., et al. 70-846-R

   County of Lackawanna, Pa., et al. v. Automobile Manufacturers Association, Inc., et al. 70-858-R

   C. Jon Handy, et al. v. General Motors, Inc., et al. 69-1548-R

2. *Robert Morgan, etc. v. Automobile Manufacturers Association, Inc., et al.* 70-1137-R

3. *The State of Illinois v. Automobile Manufacturers Association, Inc., et al.* 70-1042-R

   State of New Jersey v. American Motors Corporation, et al. 70-1041-R

   State of New Mexico v. American Motors Corporation, et al. 70-1040-R

   State of Connecticut v. American Motors Corporation, et al. 70-1043-R

   State of Wisconsin v. General Motors Corporation, et al. 70-806-R

4. *The State of New York v. Automobile Manufacturers Association, Inc., et al.* 70-1137-R

5. *The City of New York, etc. v. Automobile Manufacturers Association, et al.* 70-1477-R

City and County of Denver v. American Motors Corporation, et al. 70-1044-R

Thomas E. Keane, et al. v. General Motors Corporation, et al. 70-1039-R

6. *State of California, et al. v. Automobile Manufacturers Association, et al.* 70-541-R

FOOTNOTES

1./See Appendix A (1).

2./See Appendix A (2).

3./See Appendix A (3).

4./See Appendix A (4).

5./See Appendix A (5).

6./See Appendix A (6).

7./*Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 803 (1st Cir., 1964), cert. denied 379 U.S. 931 (1965); *Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc.*, 346 F.2d 1012, 1041n1 (9th Cir., 1965).

8./*Rock Drilling Local Union No. 17 v. Mason & Hangar Co.*, (S.D. N.Y., 1950) 90 F. Supp. 539.

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970
No. 45 Original

STATE OF WASHINGTON, STATE OF ILLINOIS,
STATE OF ARIZONA, STATE OF COLORADO,
STATE OF HAWAII, STATE OF IOWA,
STATE OF KANSAS, STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MINNESOTA, STATE OF MISSOURI,
STATE OF OHIO, STATE OF RHODE ISLAND,
STATE OF VERMONT and COMMONWEALTH OF VIRGINIA,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland Corporation,
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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SUBJECT INDEX

Page

I. The Applicable Substantive Law 2

II. Under Principles Analogous to Forum Non Conveniens the Original Jurisdiction of This Court is the Most Suitable Forum 5

Appendices:
Appendix A A-1

TABLES OF AUTHORITY

Table of Cases

Erie R. R. v. Tompkins, 304 U.S. 64 (1938) 3-4

Georgia v. Pennsylvania R. Co., 324 U.S. 439 5

Georgia v. Tennessee Copper Company, 206 U.S. 230 (1906) 4, 5

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 6, 7-8

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 3, 4

Kansas v. Colorado, 206 U.S. 46 (1907) 3

Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851) 4-5

State of Ohio, ex rel. Paul W. Brown, Attorney General of Ohio, Plaintiff v. Wyandotte Chemical Corporation et al., Defendants, Original Action No. 41 ..... 1-2, 5

State of Washington, et al. v. General Motors Corporation, et al., Original Action No. 45 2

Statutes

Clayton Act, Section 16 6

Sherman Act 2

28 U.S.C., §1404(a) 6

Textbooks

Page

Simkins, *Federal Practice*, 3rd Ed., 1938, §1135, pages 828-830 4

11 Stan. L. Rev. 665, *The Original Jurisdiction of the United States Supreme Court* 4

Other Authority

Motor Vehicle Air Pollution Control Equipment Antitrust Litigation, Docket No. 31, Transcript of Friday, March 20, 1970, pages 7-10 7

IN THE

Supreme Court of the United States

October Term, 1970
No. 45 Original

STATE OF WASHINGTON, STATE OF ILLINOIS,
STATE OF ARIZONA, STATE OF COLORADO,
STATE OF HAWAII, STATE OF IOWA,
STATE OF KANSAS, STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MINNESOTA, STATE OF MISSOURI,
STATE OF OHIO, STATE OF RHODE ISLAND,
STATE OF VERMONT and COMMONWEALTH OF VIRGINIA,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland Corporation,
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

Plaintiffs file this supplemental memorandum of law for the purpose of bringing new material to the attention of this Court, specifically to answer the following questions raised during the oral argument before this Court in *State of Ohio, ex rel. Paul W. Brown, Attorney General of Ohio, Plaintiff v. Wyandotte Chemicals Corporation, et al., De-*

fendants, Original Action No. 41, insofar as they appear applicable to the instant case.

1. If the Supreme Court were to accept original jurisdiction in *State of Washington, et al. v. General Motors Corporation, et al.,* Original Action No. 45, what substantive law would it apply?

2. Under standards analogous to these enunciated in respect to the doctrine of *forum non conveniens,* should this Court exercise its original jurisdiction in this case?

I.

THE APPLICABLE SUBSTANTIVE LAW

The complaint which plaintiffs seek leave to file has three counts. Count I states a claim under the federal Sherman Act. Clearly, federal law applies, specifically the federal statutory and case law developed under the Sherman Act.

Count II states a common law conspiracy in restraint of trade. It is a contingent or supportive claim, included as a hedge against an argument made by the defendants in related actions—but not to date in this action—that the equitable relief available under Section 16 of the Clayton Act is less broad than the powers of an equity court at common law. The evidence which would be introduced to prove Count II is identical to that needed to prove Count I. Plaintiffs are confident that if defendants' argument is made in this case it will be rejected and therefore choice of law under Count II will be a moot question. If such is not the case, however, the answer in respect to Count II should be the same as it would be in respect to Count III (see below).

Count III states a claim against the defendants in tort, namely public nuisance. In determining what law would apply, this Court should identify that nuisance as it exists in fact.

Defendants in their brief analyze Count III as if it stated seventeen separate actions for nuisance by seventeen separate states. Such an analysis would suggest that the common law nuisance of each plaintiff state be applied in respect to each plaintiff state's claim. But Count III does not plead seventeen separate nuisances; it pleads one tort of nuisance namely air pollution caused on a national scale—by motor vehicles manufactured by the defendants. Count III as pleaded describes the alleged nuisance as it really is—a national nuisance.

It should be clear that the air pollution described in Count III, irrespective of whatever differences may exist in the common law of the several plaintiff states, is not a different nuisance in Massachusetts or in Vermont, than it is in Rhode Island. Moreover, the evidence will show that pollutants emitted by motor vehicles driven in Massachusetts constitute a nuisance (i.e. pollute the air) in Vermont and Rhode Island. That being the case, it would be inappropriate for this Court to apply the law of any one state to Count III. Fortunately, precedents give this Court a wiser choice.

In original actions in suits between states this Court has fashioned and applied an interstate common law. *Kansas v. Colorado,* 206 U.S. 46, at 98 (1907). See also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938). This Court's opinion per Mr. Justice Brandeis, decided the same day as *Erie R. R. v. Tompkins,* 304 U.S.

64 (1938), described the question of whether the water of an interstate stream must be apportioned between the two states as "a question of 'federal common law' ". 304 U.S. at 110. See *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L. Rev. 665 at 681-682. See also Simkins *Federal Practice,* 3rd Ed. 1938, § 1135, pages 828-830.

Although this Court in *Georgia v. Tennessee Copper Company,* 206 U.S. 230 (1906), did not state what law it was applying it would appear from the argument made by Georgia that this Court was being asked to apply not only the statute law of Georgia but also the same kind of general federal interstate common law mentioned by Mr. Justice Brandeis in *Hinderlider v. La Plata River & Cherry Creek Ditch Co., supra.*

The argument states:

> . . . The mere fact that the subject matter of the controversy is a public nuisance affords no right of action in the premises to any private person. *Not only is this a general rule of law* but it is also incorporated in the statute law of the State of Georgia. Citizens of Georgia, by reason of the statutes denying them right of action in the premises, would have been powerless, the right of redress in such matters being reserved solely to the State.
>
> Sections 3858 and 4761 of the Code of Georgia of 1895 are practically nothing more than the codification of the law as it existed. The *general rule* is stated in *In re Debs,* 158 U.S. 587. And see *Attorney General v. Tudor Ice Co.,* 104 Massachusetts, 239; *Attorney General v. Jamaica Pond Corporation,* 133 Massachusetts, 361; *State v. Goodnight,* 70 Texas, 682. (Emphasis added) 206 U.S. at 231.

It should be noted that the fact that this Court in *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 54 U.S. (13

How.) 518 at 563 (1851), applied the state common law of Virginia is *not* an exception to the above practice because the nuisance in that case (the erection of a bridge over the Ohio River) was entirely within the state limits of Virginia.

In *Georgia v. Tennessee Copper, supra,* the nuisance was interstate from Tennessee to the air over Georgia. In the instant case as alleged in Count III the nuisance is interstate affecting not only all plaintiff states but every region and every state in the nation.

Consistent with scientific fact and the precedents of this Court an interstate or national common law should apply.

II.

UNDER PRINCIPLES ANALOGOUS TO FORUM NON CONVENIENS THE ORIGINAL JURISDICTION OF THIS COURT IS THE MOST SUITABLE FORUM

Plaintiff states understand that during the argument in *Ohio v. Wyandotte, supra,* several analogous situations were mentioned as possibly supplying guidelines to this Court in exercising its discretion as to the acceptance of original jurisdiction in suits brought by a state against citizens of another state.

Since the choice of law in the instant case requires the application of federal law, analogies to abstention in diversity cases involving questions of state law are not apposite.

Plaintiff states believe that there are no standards established in other types of cases which would be directly applicable here and that the most useful guidelines are those established by this Court in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439. (See Plaintiffs' Brief 9-11, 19-20, Reply Brief 2-14).

However, insofar as standards established by the doctrine of *forum non conveniens* and its federal statutory equivalent 28 U.S.C. § 1404(a) are applicable, these standards support the exercise of original jurisdiction in this case.[1]

The principal factors to be considered by a Court on a motion to transfer venue or in applying the doctrine of *forum non conveniens* were set forth concisely by this Court, through Mr. Justice Jackson in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). In that case this Court divided the factors into two groups, the private interest of the litigant and public interest. Under the category of private interest factors, Mr. Justice Jackson listed:

1. The relative ease of access to sources of proof;

2. Availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;

3. Possibility of view of premises, if view would be appropriate to the action;

4. All other practical problems that make trial of a case easy, expeditious and inexpensive;

5. Enforcibility of a judgment if one is obtained;

6. The plaintiff's choice of forum.

Point 3 is not applicable. Points 1, 2, 4, 5 and 6 all weigh in favor of original jurisdiction. If the seventeen plaintiff states were able to file this identical action, including Count III, in a single federal district court, the probable forum chosen would be the central district of Los Angeles. Yet even that court, as pointed out by the defendants them-

1. 28 U.S.C. § 1404 (a) reads as follows:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

selves in argument before the Judicial Panel on Multidistrict Litigation,[2] has less access to all the sources of proof in this case than would this Court trying the case through a master. Depositions, it is true, can be taken anywhere, but personal attendance of out of state witnesses in Los Angeles cannot be compelled.

If credibility becomes an issue on the question of conspiracy, live testimony is clearly preferable. Federal masters can and do sit throughout the country to take testimony.

As to enforceability of a judgment, a nationwide injunction as sought by plaintiff states would at least be more appropriately enforced by this Court and possibly more effectively enforced by this Court, again through a master free to travel to Michigan and nationwide to make appropriate findings on compliance.

Under the category of factors of public interest, Mr. Justice Jackson listed:

> 1. Administrative difficulties which follow for courts when litigation is piled up in congested centers instead of being handled at its origin;
>
> 2. The burden of imposing jury duty upon the people of a community which has no relation to the litigation;
>
> 3. Reason for holding the trial in view of persons whose affairs are touched by the litigation rather than in remote parts of the country where such persons can learn of it by report only;

---

2. Defendants' counsel pointed out that the "center of gravity" of the action lies in Detroit. See Motor Vehicle Air Pollution Control Equipment Antitrust Litigation, Docket No. 31, Transcript of Friday, March 20, 1970, pages 7-10, attached as Appendix A. Moreover, on the question of the fact of damage and the impact of the alleged air pollution, witnesses will undoubtedly be required from a number of the plaintiff states and the several sections of the country.

4. The local interest in having localized controversies decided at home;

5. The appropriateness of having a diversity case tried in a forum that is at home with the state law which must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself. 330 U.S. 508-509

Insofar as these public principles apply at all, they do not suggest a single federal district court in Los Angeles or elsewhere as a more "convenient" or appropriate forum. This case, as demonstrated by the identity of the seventeen plaintiff states, the fact that these states represent every section of the land and over 30% of the nation's population, and the fact that the complaint alleges a nationwide conspiracy and a nationwide nuisance, is a national not a local case in every sense of the word. It deserves a nationwide forum. At the present time only the original jurisdiction of this Court furnishes such a forum.

Respectfully submitted,

Dated February 12, 1971

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APPENDIX A

Motor Vehicle Air Pollution Control Equipment Antitrust Litigation, Docket No. 31, Transcript of Friday, March 20, 1970, pp. 7-10

MR. CUTLER: Right. And we think this is an appropriate case before you now.

I take it in this connection that the critical question for the Panel to determine, to use Judge Wisdom's phrase in the Children's Book Case, is where the center of gravity of these actions lies. In our view that center of gravity plainly lies in the Detroit area. This is where the headquarters of the four defendant passenger car manufacturers are located.

This is where the Automobile Manufacturers Association, which administered the cooperative research program, is located.

This is where almost all of the pertinent meetings relating to that program were held. Where almost all of the pertinent documents originated, and where most of the witnesses who know anything at all about that program were and live.

It is not an accident or a mere newspaper headline by a short end that the automobile industry is usually referred to as Detroit. That Californians and others blame automotive emissions on Detroit. They use the term "Detroit" as a synonym for the industry. No other city in the country, except perhaps Hollywood, has become as much of a synonym for an entire industry as Detroit.

Now, in proposing Detroit as the most appropriate forum, we are not doing so in order to find ourselves a friendly judge. We accept that the judges in any district would be impartial and a Detroit judge is no more likely to be predisposed toward the defendants in these cases than a judge in any of the districts where the public body of plaintiffs have elected to file their cases is likely to be predisposed toward those plaintiff bodies.

For example, the State of California in Los Angeles; the State of Wisconsin in Madison; the State of Illinois in Chi-

cago, the Aldermen in Chicago; the City of Philadelphia in Philadelphia; the State of New York in New York City.

In any event, as Your Honors of course know and have done before, whatever forum is selected, the Panel has the option, with the consent of the appropriate Chief Judge of the District, to select a Circuit Judge or a District Judge from another district to handle the pretrial proceedings.

The reasons in favor of Detroit, we believe, are reasons of location, not reasons relating to the identity or the friendliness of a judge.

The largest single group of witnesses having knowledge of the facts relating to the core of the complaints in these cases is located in Detroit.

CHIEF JUDGE MURRAH: Would you repeat that.

MR. CUTLER: The largest single group of witnesses, Judge Murrah, who have knowledge of the facts relating to the core allegations of this complaint, the allegations that the automobile companies engaged in an unlawful conspiracy, they are all—almost all of them—located in the Detroit area.

They are the automobile company scientists, engineers and executives who have been working on emission control problems for the past seventeen years.

We estimate that over 300 such individuals employed by these defendant companies have served as members of the various AMA emission control committees that have been working in this area since 1953.

And that a substantial number of these people, perhaps well over a hundred, are still working on emission control matters in the Detroit area. They are working overtime schedules in an effort to meet the higher emission control standards that have already been promulgated for 1974 in California and are scheduled for 1975 around the rest of the country.

And they are working on the effort which has received so much public attention to eliminate harmful emissions completely within a very short time after that.

Now, we recognize that these men undoubtedly are

going to have to lose some time from their work in preparing for depositions and testimony in these proceedings, but we respectfully submit that it is very much in the public interest to hold the amount of lost time to the absolute minimum, and that this can best be done by transferring the cases to the Eastern District of Michigan.

CHIEF JUDGE MURRAH: Most all of the discovery will be depositional, will it not?

MR. CUTLER: The discovery will be depositional and documentary, yes.

CHIEF JUDGE MURRAH: And it will be just as easy and facile to conduct the deposition program in Detroit with the witnesses there, if the cases were transferred elsewhere as if they were transferred to the Eastern District of Michigan?

MR. CUTLER: We recognize that that possibility is open, Judge Murrah, and that the panel has availed itself of the possibility before, but we think that would require either extensive delays in completing each deposition, while the lawyers travel to the transferee forum to argue deposition objections, or that it would require the designation of a separate additional judge in Detroit to hear and rule on the objections.

Supreme Court, U.S.
FILED
SEP 1 1970
E. ROBERT SEAVER, CLERK

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Plaintiffs,

vs.

GENERAL MOTORS CORPORATION, *et al.*,

Defendants.

On Motion for Leave to File Complaint.

Brief for the States of Alabama, et al., as Amici Curiae.

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SUBJECT INDEX

Page

Statement of the Case 2

Summary of Argument 5

Argument 8

I.

Reasons of Practical Wisdom Favor This Court's Retention of Its Original Jurisdiction in This Litigation 10

1. Issues of Federal Law 10

2. Matters of National Import 13

3. Involvement of Other Official Bodies 14

4. Whether There Are Complex Fact Questions 18

(1) The Retrofitting Remedy Is Authorized by 15 U.S.C. § 26 20

(2) There Is No Mystery as to the Technical Facts 21

II.

This Court Should Assume Jurisdiction in Order to Provide the Most Expeditious Solution to the Problem 26

Conclusion 30

TABLE OF AUTHORITIES CITED

Cases	Page
Alabama v. United States, 371 U.S. 37 (1962), aff'g, 304 F. 2d (1962)	20
Ames Co. v. Bostitch, Inc., 240 F. Supp. 521 (1965)	21
Boys Markets v. Retail Clerks, 398 U.S. 235 (1970)	12
Carnation Co. v. Pacific Conference, 383 U.S. 213 (1966)	16
City of Chicago v. General Motors Corporation, et al., No. 70 C 1904 (N.D. Ill.)	16
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International Boxing Club of New York v. United States, 358 U.S. 242 (1958)	20
J. I Case Co. v. Borak, 377 U.S. 426 (1964)	16, 17, 20
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Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)	2, 5, 6, 8, 9, 10, 11, 13, 14, 15, 18, 19, 30
Oregon v. Mitchell, 400 U.S. 112 (1970)	9
Porter v. Warner Holding Co., 328 U.S. 395 (1946)	21

Page

Schine Chain Theatres v. United States, 334 U.S. 110 (1948) 20, 21

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Defendants.

On Motion for Leave to File Complaint.

Brief for the States of Alabama, et al., as Amici Curiae.

This brief *amici curiae* is submitted by the States of Alabama, et al., pursuant to Rule 42(4) of the Rules of this Court. *Amici* are 16 states of the United States and the City of New York, New York. In common with plaintiffs, *amici* have complained against defendants seeking affirmative equitable relief from the injury wrought by the antitrust violations involved in these cases.

Although a number of *amici* first brought their complaints in the district courts, we agree with plaintiffs here that as matters now stand the controversy should more appropriately be considered by this Court as an original matter. If the Court agrees to entertain this complaint, *amici* will seek leave to join as plaintiffs here.

The complaint plaintiffs ask leave to file seeks a remedy for the fouling of the nation's air that has resulted from the automobile manufacturers' conspiracy to delay research, development and installation of auto pollution control devices. The principal remedy plaintiffs seek in order to undo the massive consequences of that violation is feasible legally, technically and economically. That remedy is to require defendants to install ("retrofit") emission control devices on used cars presently on the road.

Amici agree with plaintiffs that this nationwide litigation presents a rare and urgent situation which calls for this Court's exercise of its original jurisdiction. While the pleadings thus far submitted by the parties preceded this Court's decision in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), we shall show that the present circumstances fully satisfy the criteria for the exercise of original jurisdiction laid down in *Wyandotte.*

Statement of the Case.

Plaintiffs have presented a full statement of the case. For present purposes, only a few essential facts need be highlighted.

Arrayed as plaintiffs, both in this Court and in the lower courts, are 34 sovereign states, representing the preponderant portion of the nation's population and the geographic areas most seriously affected by the polluting emissions from defendants' automobiles.

The defendants—manufacturers of most of the cars produced in this country—stand charged with antitrust violations of unprecedented seriousness. Essentially, plaintiffs and *amici* allege that defendants engaged in a

long-standing antitrust conspiracy,[1] starting before 1955, to retard and prevent research, development and installation of effective air pollution control devices on their automotive products. The effects of this antitrust violation can now be seen from almost any urban window, as massive amounts of pollutants emitted from automobiles not equipped with emission control devices literally color the nation's skies.

An appreciation of the matters now before the Court requires an understanding of the overall history of the automotive air pollution litigation.

Prior Federal Proceedings. In 1965 the federal government issued a civil investigative demand inquiring into defendants' actions on air pollution, and a grand jury later conducted an extensive investigation. Although no indictment was requested, in early 1969 a civil complaint was filed by the Antitrust Division charging defendants with conspiracy to eliminate competition in research, development, manufacture and installation of motor vehicle air pollution control equipment. The civil case was soon settled by a consent decree that did no more than forbid any future combination to restrain air pollution control despite the strenuous objections of many major public bodies that such relief was inadequate. *United States v. Automobile Manufacturers Ass'n,* 307 F. Supp. 617 (C.D. Cal. 1969) *aff'd sub nom. City of New York v. United States,* 397 U.S. 248 (1970).

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[1]The proffered original complaints also allege common law conspiracy and nuisance counts in addition to the antitrust violations. However, the antitrust violation is patently the principal charge, and is the one which *amici* contend furnishes the clearest basis for this Court to accept original jurisdiction. This litigation stems from the civil antitrust complaint filed by the federal government against the automobile manufacturers which was settled by consent decree. See page 3, *infra*.

"Private" Actions in the District Courts. Most of the objecting public bodies then instituted their own antitrust actions seeking the relief that had been omitted from the federal consent decree. In substance, those cases seek two kinds of relief: (1) an injunction requiring the defendants to "retrofit" used cars with the antipollution devices that would have been installed as original equipment but for the conspiracy, and (2) damages for injuries to interests represented by the plaintiffs that have already occurred from air pollution caused by the conspiracy. On April 6, 1970, the actions filed by these public bodies in district courts throughout the Nation were consolidated under 28 U.S.C. §1407 for pretrial proceedings in the Central District of California; they are henceforth referred to as the "Docket 31" litigation (using the docket number assigned them by the Judicial Panel on Multidistrict Litigation).[2]

In the almost two years since the first public body complaints were filed in the district courts, the Docket 31 litigation has made little progress:

Defendants moved to dismiss the Docket 31 cases on the grounds, *inter alia,* that plaintiffs lacked standing and were seeking relief which could not be granted. On September 4, 1970 the district court denied defendants' motion to dismiss but thereafter certified its de-

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[2]*In re Multidistrict Private Civil Treble Damage Antitrust Litgation Involving Motor Vehicle Air Pollution Control Equipment,* 311 F. Supp. 1349 (JPML 1970). Since the original jurisdiction complaints were filed, seventeen states which had not previously filed in the district court have done so in order to protect themselves from the bar of the statute of limitations. Included among these recently filing states are 16 who had previously filed in this Court and who then filed in the district court on a "standby basis" in the event this Court declined to accept original jurisdiction.

cision denying defendants' motion as appropriate for appellate review under 28 U.S.C. § 1292(b). Permission to appeal was granted by the court of appeals on February 17, 1971. Defendants' briefs were filed on July 26, 1971.

On January 26, 1971 the district court released to the plaintiffs most of the documents gathered in the federal grand jury investigation. M.D.L. Docket 31 Pretrial Order No. 3. These had previously been impounded by the district court for the use of "treble damage claimants or others" when the consent decree was approved. 307 F. Supp. at 620. The Docket 31 plaintiffs have been reviewing this voluminous evidence since then. (Some of the Docket 31 cases were withheld from certification to the court of appeals, so that proceedings could go forward in the district court during the interlocutory appeal.)

Ultimately, when the pending appeals, further pretrial procedures, and any other interlocutory appeals that may arise are completed, the Docket 31 cases will be returned to the 23 districts where they began, for trial on the merits, subsequent determination of appropriate remedies, appeal to the respective courts of appeal and, inevitably, review by this Court.

In this setting *amici* urge this Court to assume original jurisdiction of the controversy.

Summary of Argument.

When the principles outlined in this Court's decision last Term in *Ohio v. Wyandotte*, 401 U.S. 493 (1971), are applied to the circumstances of the present case, it becomes clear that this is a case where both the policies of Article III and "reasons of practical wisdom" call

for the retention of original jurisdiction. This is not, like *Wyandotte*, a single State's suit of local concern based on local law that could be brought in the plaintiff's own courts. Rather, it is a case where numerous states seek relief under the federal antitrust laws—as to which this Court has a special role—for a problem of urgent nationwide concern. This litigation cannot feasibly be handled in separate suits in federal courts in each of the plaintiff States, and moreover, Article III contemplates that a State unable to sue in its own State courts should not be required to look elsewhere than this Court for judicial relief.

None of the practical considerations considered in *Wyandotte* favors a declination here of the jurisdiction that this Court should presumptively exercise:

(1) This case raises fundamental questions of federal antitrust law, relating to the offense charged, plaintiffs' standing to sue and the power of a court of equity—which we show to be indisputable—to provide the relief plaintiffs seek. Plaintiffs seek principally to undo future effects of the violation alleged by requiring defendants to install *i.e.*, *"retrofit,"* antipollution devices in existing automobiles. These are questions that must be resolved in this Court sooner or later, wherever the cases are tried.

(2) The problem is plainly of nationwide import.

(3) The retrofit remedy central to this litigation is unavailable in any nonjudicial forum. The limited federal administrative regulation of automotive air pollution covers only post-1968 new cars and even those incompletely, and state regulation is inappropriate and inadequate for coping with the national

problem created by defendants' efforts to impede the fight against air pollution.

(4) As our brief exposition of air pollution technology shows, that technology is not the mystery defendants claim it to be and pollution-control devices are readily available for retrofit in the present state of the art; thus, the factual and remedial elements of this case are not unmanageable for this Court assisted by a Special Master.

The enormity and urgency of the nationwide health and economic problem that gives rise to this suit calls for expeditious resolution that can come only if this Court takes the case now.

ARGUMENT.

This Court's decision last Term in *Ohio v. Wyandotte*, 401 U.S. 493 (1971), established the framework for the Court's determination as to whether the federal antitrust count of the present complaint should be retained here or remitted to the concurrent jurisdiction of the several district courts.

As this Court recognized in *Wyandotte*, that determination starts with the presumption that the Court must generally exercise the jurisdiction it has, 401 U.S. at 497, but proceeds on the principle that the Court may exercise discretion to select those cases that are especially deserving of and appropriate for original consideration. That is, the Court "may decline to entertain a complaint brought by a State against the citizens of another State * * * only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) [there are] reasons of practical wisdom that persuade us that this Court is an inappropriate forum * * *." 401 U.S. at 499. We shall show that application of these criteria to the unique circumstances of this case militates in favor of the Court's exercising its jurisdiction over the present complaint.

The Article III policies discussed in *Wyandotte* add up to a general principle that a state should not be required to resort to another state's courts or indeed to any court other than its own in order to obtain relief. In *Wyandotte*, the Court concluded that plaintiff Ohio's own courts would be competent to entertain its lawsuit, which was based purely on local law. Here, unlike *Wyandotte*, a federal forum is available (indeed

many are available) to these plaintiffs but the nature of the case is such that (1) no state's own courts have jurisdiction, and (2) no state's claim can, as a practical matter, be handled in the federal court sitting in that state even if that would satisfy the Article III policy. In fact, the pending district court cases brought by the states are all now centralized in a California federal district court for pretrial proceedings.

The second branch of the Article III policy articulated in *Wyandotte* makes it insufficient that a state plaintiff has a remedy in a lower federal court. Rather, Article III by its terms reflects the Framers' judgment that a state unable to sue in its own court should not be required to go anywhere else except this Court: "Such exclusive jurisdiction was given to this court because it best comported with the dignity of a state that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation." *United States v. Texas,* 143 U.S. 621, 643 (1892). There is, moreover, the further Article III policy, reflected in such cases as *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), and *Oregon v. Mitchell,* 400 U.S. 112 (1970), that matters of urgent importance to all or many of the states of the Union are particularly appropriate for determination here, without the necessity of time-consuming and duplicative litigation in numerous district courts and courts of appeals.

Thus the principles of *Wyandotte* permit this Court to decline original jurisdiction only if the declination is *both* consistent with Article III policies *and* required by practical considerations. The practical considerations outlined in *Wyandotte* are four:

1. Whether there are serious issues of federal law presented;

2. Whether the matter is one of national import;

3. Whether other official bodies are "actively involved in regulating the conduct complained of" (401 U.S. at 502); and

4. Whether there are complex fact questions which would be better dealt with initially at a trial level.

Measured against these standards, this litigation merits treatment different from *Wyandotte*.

I.

REASONS OF PRACTICAL WISDOM FAVOR THIS COURT'S RETENTION OF ITS ORIGINAL JURISDICTION IN THIS LITIGATION.

1. Issues of Federal Law.

In *Wyandotte*, the single factor which weighed most heavily was that only an issue of local law was presented. The State of Ohio sought abatement of a nuisance. This Court held that "much would be sacrificed, and little gained, by our exercising original jurisdiction over issues bottomed on local law." 401 U.S. at 497. In this litigation, however, every important issue is one of federal antitrust law—the nature of the offense, plaintiffs' standing to sue, and the propriety of the relief sought. These are issues with which this Court is continually concerned. They are bound to come to this Court eventually if they are not entertained now.

Nature of the Offense. The gravamen of the complaint here is Count I, the charge of violation of the antitrust laws. What is charged is a classic antitrust conspiracy to suppress technology. See *Rep. of Attorney General's Comm. to Study Antitrust Laws*, 230-231

(1955), and cases cited. However, defendants' assertion that the theory of violation is "novel and unadjudicated,"[3] raises a fundamental question of the interpretation of the Sherman Act, a staple of this Court's business.

Plaintiffs' Standing to Sue. In the Docket 31 cases, defendants have also attacked plaintiffs' standing, claiming that the state and other public body plaintiffs are not entitled to sue because they were not the parties against whom the violation was directed, had no "commercial relationship" with defendants, and were not within the "target area" of the violation. Although we believe this issue was decided correctly against defendants by the §1407 judge, his certification of the issue to the Ninth Circuit incorporated his determination that it is "a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Issues relating to standing to sue under the antitrust laws are of a kind over which this Court does have a "claim to special competence." *Wyandotte,* 401 U.S. at 497-8. See, *e.g., Hawaii v. Standard Oil of California,* No. 70-49.

The Relief Sought—Retrofitting. The ultimate issue presented in this litigation is whether, if the allegations of the complaint are sustained, the defendants should be required to "retrofit," *i.e.,* install anti-pollution devices on the automobiles they manufactured during the conspiracy period. In this Court, defendants have reiterated their contention, previously urged in lower courts, that the mandatory relief which plaintiffs

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[3]Br. in Opp. 7. Defendants rely on a comment by Judge Curtis made in support of his approval of the consent decree in the federal case. *United States v. Automobile Manuf. Ass'n.,* 307 F. Supp. at 621.

seek is beyond the equitable powers of *any* federal court. (Br. in Opp. at 22 n. 23.) This argument is based on defendants' construction of §16 of the Clayton Act. That, of course, raises a question of *federal* law.[4] And defendants' subsidiary arguments that such a remedy would be inappropriate because of state and federal laws dealing directly with pollution likewise raise issues which—if they are sufficiently substantial to merit notice at all—involve federal questions, and of a character particularly suitable for *this* Court. For whether federal courts should defer in formulating a remedy for a violation of a federal statute to various state schemes of regulation is an issue of federalism which has historically been within this Court's special competence. And defendants' alternative assertion that there is some inconsistency between an order requiring retrofitting of cars manufactured in the past, pursuant to an antitrust conspiracy, and their duty under recent Acts of Congress to install such devices on cars built in the future, invites an accommodation of federal statutes. This, too, is a task which only this Court can fulfill with authority and finality. Compare *Boys Markets v. Retail Clerks,* 398 U.S. 235 (1970); *Mine Workers v. Pennington,* 381 U.S. 657 (1965).

In summary, it is plain that at every turn this litigation presents federal questions, and federal questions only. It is a foregone conclusion that, given their importance, and the enormous stakes involved, the parties to this litigation are unlikely to rest until they have made every effort to have these issues finally decided by this Court.

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[4]We treat this issue on the merits at pp. 20-21, *infra,* because it is logically antecedent to consideration of defendants claim that the retrofitting remedy involves such factual complexities that this Court should stay its hand.

2. Matters of National Import.

In *Wyandotte,* the problem concerned the contamination of a limited geographic area, Lake Erie. One state brought the complaint. Here the problem is national and 34 states are seeking relief.

The national character of the problem results principally from the oligopolistic character of the automobile industry. Through 1969 the defendant automobile manufacturers consistently accounted for over 85% of all cars registered in the nation.[5] When these manufacturers conspired, the result was inherently a national problem, compounded by the natural movement of the air and the mobility of motor vehicles. In this litigation the enormity of the injury caused by defendants overshadows every other consideration.

This Court declined *Wyandotte* because otherwise it "would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers." 401 U.S. at 498. This litigation presents precisely those serious "matters of federal law and national import" which are deserving of this Court's attention. Accordingly, assertion of jurisdiction in the present case would not, as in *Wyandotte,* require the Court to "pick and choose arbitrarily among similarly situated litigants" (401 U.S. at 504) with localized pollution problems. The magnitude of the automotive air pollution problem and its nationwide character differentiaties this case in kind, not merely in degree.

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[5]See *Automotive News,* 1971 Almanac, issue of April 26, 1971, p. 20, Table: Percentage of Car Makes to Total U.S. Registrations, 1962-1970.

3. Involvement of Other Official Bodies.

In *Wyandotte* this Court declined to commit its "resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis." 401 U.S. at 503. The case here is far different.

The most important issue which this Court is being asked to resolve, and the one with which *amici* are principally concerned, is the appropriateness of a decree requiring retrofitting. Assuming the automobile manufacturers' violation ceased as of the entry of the consent decree, the automobiles manufactured and sold during the time of the conspiracy are still on the road, and, lacking control equipment, continue to spew their pollutants into the atmosphere. The violation caused these polluting cars and the "natural remedy" is to retrofit them, just as the "natural remedy" for an illegal merger is dissolution. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961).

This issue is one which can best be resolved in this Court. Defendants of course say otherwise. The simple fact is that the auto manufacturers are currently engaged in seeking to persuade each adjudicatory and regulatory body before whom they appear on any pollution problem, that the relief "pea" is not under that "shell."

In this Court the manufacturers point to federal regulatory statutes. They argue that plaintiffs "do not assert that defendants are not or will not continue to be in compliance with Federally prescribed standards." (Br. in Opp. 21.) This argument is at best unseemly. Defendants stand accused of a conspiracy in violation of federal law, resulting in an enormous nationwide injury. They should not, in effect, taunt the injured

parties with the claim that there were not at the time of injury any laws which affirmatively required them to do that which they illegally conspired not to do.

More important, as defendants know full well, there is no federal regulation covering emissions on used cars or retrofitting. Federal regulation of automotive emissions began with the 1968 model year—but only for *new* cars.[6] Accordingly, the effects of the antitrust violation which was the subject of the 1969 consent decree remain to be dealt with—at the least—with respect to pre-1968 models.[7] Defendants' only answer to the indisputable fact that retrofit is solely a matter of judicial concern is the suggestion that a conflict "may * * * arise" if federal legislation is passed in the future. (Br. in Opp. 21.) Such a possibility cannot meet the *Wyandotte* test of involvement by other adjudicatory and regulatory bodies.

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[6]Public Law 89-272 enacted October 20, 1965 [42 U.S.C. §1875f-1 *et seq.*] authorized the Secretary of Health, Education and Welfare to establish national Standards applicable to emissions from "*new* motor vehicles or *new* motor vehicle engines * * *." (Emphasis added.) Partial regulations were promulgated under this law for vehicles beginning with the 1968 model year. See generally 45 C.F.R. §85 (1970). Stricter and more comprehensive controls were imposed by the Clean Air Act of 1970, Pub.L.91-604. None of these statutes or regulations, however, dealt with retrofitting of pre-1968 models.

> "In explaining the EPA's approach to automotive pollution control to the Detroit Auto Writers Group, [Eric] Stork, [Acting Director, Mobile Source Pollution Control, Environmental Protection Agency], indicated that the Federal Government will continue to concentrate its regulatory efforts on the auto industry. On retrofitting used cars with emission control equipment—a move which would greatly speed the current downward trend in total automotive emissions—Stork said the federal level has no authority to act." *Automotive News*, July 26, 1971, p. 12.

[7]Although an argument against granting relief with respect to *new* vehicles in the 1968 and later model years may have

(This footnote is continued on next page)

Defendants also seek to have this Court defer to "the important role assigned to state and local governments under the provisions of the Air Quality act of 1967 * * * in the control of pollution from all sources." (Br. in Opp. 22.) But automotive air pollution is a problem which inherently has nationwide significance.[8] Moreover, since federal law "control[s] the appropriateness of redress despite the provisions of [existing] state * * * law," *J. I. Case Co. v. Borak,*

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superficial appeal, the delay caused by defendants' conspiracy in all likelihood set back the state of auto pollution control technology even after the conspiracy purportedly ended. And since the National Emissions Standards Act, unlike the Shipping Act, contains no provision "explicit [or otherwise] exempting activities which are lawful under * * * the Act from the Sherman and Clayton Acts," *Carnation Co. v. Pacific Conference,* 383 U.S. 213, 216 (1966), defendants' argument loses much of its force. *United States v. Borden Co.*, 308 U.S. 188, 198-202 (1939); *United States v. R.C.A.*, 358 U.S. 334, 339-346 (1959); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 461 (1945).

In *City of Chicago v. General Motors Corporation, et al.*, No. 70 C 1904 (N.D. Ill.), Judge Marovitz dismissed a "class action products liability case," brought under state law, against the auto manufacturers based on the charge that motor vehicles are products creating a hazard to health and welfare of the Chicago area. Opinion filed June 25, 1971. In doing so he held that federal legislation "essentially pre-empts the motor vehicle pollution field" insofar as an action based on state law is concerned, but nevertheless recognized that "the vehicles in question [pre-1968 models] are not covered by recent federal legislation." (Slip Opin. p. 12.)

[8]Indeed, in the very act on which defendants rely for their "state and local government" argument there was a specific finding that "federal standards should supersede state and local laws on emissions from motor vehicles * * * in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles." *H.R. 728 on S. 780,* 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Adm. News 1956. Even earlier, in passing the Motor Vehicle Air Pollution Control Act of 1965, Congress found that "The high rate of mobility of automobiles suggests that nothing short of nationwide control would scarcely be adequate to cope with the * * * problem." *H.R. No. 899 on S.306,* 89th Cong., 1st Sess., 1965 U.S. Code Cong. & Adm. News 3608, 3612.

377 U.S. 426, 434 (1964), the argument that a state or local government's remedy under the federal antitrust laws can be defeated by self-help, *i.e.*, by enacting state or local legislation to provide it, is undeserving of serious consideration.

While seeking to avoid this Court's jurisdiction on retrofit as an antitrust remedy, the manufacturers are concurrently indicating their inability to meet future federal regulatory standards on new cars.[9] At the same time, the manufacturers are of course complaining of the burden and interference of state regulation.[10]

The pollution created by used cars is in itself a clearcut and separable problem to be remedied, quite

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[9]See, *e.g.*, statement by H. L. Misch, Vice President-Engineering and Manufacturing, Ford Motor Company, to the Environmental Protection Agency, May 6, 1971:

> "Ford Motor Company is actively engaged in an extensive research and development program in an all-out effort to meet the emission requirements of the Clean Air Amendments of 1970. The attainment of 1975 standards in the short time available is a tremendous task. It is too early to determine whether we will actually be able to meet those requirements * * *."

And see statement by S. L. Terry, Vice President-Safety and Emissions, Chrysler Corporation, to the EPA, May 7, 1971:

> "[P]assage of the Clean Air Act of 1970 completely changed our plans. As you know, the Act calls for reduction of 98% of the hydrocarbons, 97% of the carbon monoxide, and 90% of the oxides of nitrogen from unmodified cars. Today we know of no way to meet these levels * * *."
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> "The passage of the Clean Air Act of 1970, however, has removed all sense of order from our development and planning because of the completely unexpected stringency and timing of the emission levels required for all new cars."

[10]"Ford Motor Company shares with you the objective of complying with the 1975-76 standards specified in the Clean Air Amendments of 1970, but we are compelled to tell you that our engineering efforts to realize that goal are being diluted by the necessity to respond to the 1972-74 standards of EPA and California." Misch statement to EPA, *supra*, note 9.

apart from the problems of new cars. Defendants nowhere advance the contrary contention. Indeed, the most defendants say is that "further reductions [in emissions] will result as the proportion of post-1967 cars increases * * *." (Br. in Opp. 21.) This statement undoubtedly reveals the basic thrust of the manufacturers' efforts, which is to thwart and delay being brought to book for their antitrust violation until corrective action will no longer be of any use, and full compensation for the injury done may be impossible. It is to prevent precisely such a result that this Court should assume jurisdiction of the problem.

4. Whether There Are Complex Fact Questions.

In *Wyandotte* this Court concluded that what was "in dispute is not so much the law as the facts." 401 U.S. at 503. The Court found "virtually no published research" on how to solve the fact problem presented, and that "novel scientific issues of fact [were] inherent." 401 U.S. at 503, 504-5. Accordingly this Court indicated that it would be "to say the least unrealistic" to expect an appellate tribunal to deal with complex facts involved "even with the assistance of a most competent Special Master * * *" 401 U.S. at 504.

Again, the situation here is the contrary. The principal issue of liability involves essentially a legal question centering on Federal antitrust law. Defendants freely admit the contractual framework of their conspiracy. (Br. in Opp. 3) Defendants' documents now under protective order of the district court in the Docket 31 proceedings will establish the actions, and non-action, of the defendants within this framework. Knowledge of the intricacies of automotive technology is not necessary to the proof of the initial issue of whether defendants'

actions constituted an antitrust conspiracy. The issue of relief, as discussed in point 1, *supra,* also basically involves an issue of federal law.

Defendants also claim that this Court should decline jurisdiction because the propriety of the retrofitting remedy "poses complex factual issues" involving "a highly technical and complicated field." (Br. in Opp. at 1 and 20.) This argument is inconsistent with defendants' denial that any federal court has the power, under §16 of the Clayton Act, to provide such a remedy. For, if this Court were to sustain the latter contention, no factual issues regarding propriety of this remedy or its precise terms could ever arise in the case.

Plainly, the "practical considerations" which govern the exercise or non-exercise of this Court's original jurisdiction under *Wyandotte* do not include the theoretical difficulties of litigating issues which cannot arise *as a matter of law*. This does not mean, of course, that in determining whether to entertain a case the Court must anticipate every legal question which may arise in the course of the litigation. But it does mean that, before it declines to exercise jurisdiction on grounds of avoiding unsuitably complex questions of facts, the Court must at least be satisfied that there is a substantial likelihood that those factual issues are not merely hypothetical.

Accordingly, assessment of this phase of defendants' argument that this Court is an inappropriate forum must be undertaken in two steps. First, we shall establish that this Court does have power to require retrofitting if liability is proven. It will thus appear that the supposed "factual complexity" of the retrofitting remedy is *relevant* to a disposition of the motion for

leave to file the complaint—a logical step which defendants would elide. We shall then show that this Court should nevertheless assert jurisdiction because the technical difficulties envisaged by defendants are, like the original reports of Mark Twain's death, "considerably exaggerated."

(1) The Retrofitting Remedy Is Authorized by 15 U.S.C. § 26.

Defendants have contended that §16 of the Clayton Act, 15 U.S.C. § 26, permits only injunctive relief against future antitrust violations.

Section 16 authorizes a private litigant to seek injunctive relief against "threatened loss or damage." The statutory words are clear and unequivocal. An injunction may issue under § 16 to prevent future "loss or damage"—not merely future violations. Even if the antitrust violation is over and done with, the federal courts may issue decrees to prevent continuance of the injury resulting from the past violation.[11]

The antitrust laws empower the federal courts to order whatever affirmative action is necessary "to redress the anti-trust violation proved," *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961), 'to make certain that justice is done," *International Boxing Club of New York v. United States*, 358 U.S. 242, 252 (1958), and to "undo what could have been prevented * * *." *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948). Thus, upon proof that these defendants conspired to retard and prevent the development and installation of air pollution emis-

[11]This Court has consistently construed other federal statutes to afford such mandatory relief. *E.g., J. I. Case Co. v. Borak*, 377 U.S. 426 (1963); *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Alabama v. United States*, 371 U.S. 37 (1962), aff'g. 304 F. 2d 583, 590-593 (5 Cir. 1962).

sion devices, injured private plantiffs would be as much entitled to have the federal courts "undo what could have been prevented" as would the federal government. *Cf. Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). The legislative history of the Clayton Act establishes that Congress intended the equitable remedies available to private parties under § 16 to be equivalent to those available to the United States.[12]

(2) There Is No Mystery as to the Technical Facts.

Since automobiles are ubiquitous in our society, as are garages and repair shops, the basics of automobile engine operation are necessarily well-established and not open to dispute. The basics of automotive pollution and its control are similarly well-established.[13]

These basic facts of auto pollution can be briefly stated. The important automotive pollutants are three noxious gases: hydrocarbons (HC) carbon monoxide (CO), and oxides of nitrogen (NO_x). HC, which are simply unburned gasoline particles, react chemically with NO_x in the presence of sunlight to form photochemical smog. CO is in itself a noxious gas which is lethal in sufficient concentrations.

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[12]51 Cong. Rec. 14214-14215 (1914). This is why, for example, divestiture has been declared an appropriate remedy in private antitrust cases, as well as in Government cases. Compare *Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965); *McKeon Construction Co. v. McClatchy Newspapers*, 1970 Trade Cas. ¶ 73,212 (N.D. Calif. 1969). Defendants make a related argument that the relief sought by the tendered complaint would be "punitive and confiscatory." (Br. in Opp. at 23, n. 25.) But a federal court cannot be blocked from granting effective relief by such hyperbole. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189) (1943); *Schine Chain Theatres v. United States, supra; United States v. E. I. du Pont de Nemours & Co., supra*, 366 U.S. at 326.

[13]See "Motor Vehicles, Air Pollution, and Health," A Report of the Surgeon General to the U.S. Congress in Compliance with Public Law 86-493, June 1962, p. 9, *et seq.*

HC are emitted in three ways on uncontrolled automobiles. Most HC, generally about 60%, are emitted from the exhaust. Second, a significant amount of HC, averaging perhaps 20%, is emitted from the road draft tube, which is a vent from the crankcase into the open air. Any of the gases in the cylinder that are blown past the piston rings go into the crankcase, and out the road draft tube. These gases, popularly called "blowby," contain HC. Third, evaporative losses from the fuel tank and carburetor together account for perhaps another 20% of total HC emissions.

CO and NO_x result from the combustion of gasoline and air. These two gases emanate almost entirely from the exhaust.

Auto emission controls must therefore cure these pollution sources—(i) blowby emissions, (ii) evaporative losses, and (iii) the exhaust. Crankcase controls and evaporative controls have for all practical purposes eliminated both these sources of HC emissions on new cars. Exhaust emissions on new cars have been reduced but not eliminated by engine modifications.

Blowby Emissions. Starting with 1963 models, the domestic manufacturers have simply removed the road draft tube, and in its place run a line to carry the blowby back into the intake manifold of the engine. This is the so-called PCV (positive crankcase ventilation) system. On all 1968 and later models, total elimination of blowby emissions was accomplished by another line carrying excess blowby gases from the air breather cap at the top of the engine back into or below the air cleaner—the so-called "closed system."

Retrofitting of used cars to eliminate blowby emissions is not only possible, it is an established everyday

procedure which has been carried on since 1964 in California under the law of that state. California Health and Safety Code § 39129. The devices to accomplish this retrofit are all developed and awaiting only a court order requiring their installation.

It is important to note that such relief will go directly to one aspect of the violation charged in the complaint. The manufacturers' delay in installing these crankcase controls on their vehicles constitutes one of the principal charges before the Court.[14]

Evaporative Controls. Controls which substantially eliminate evaporative losses were introduced nationally on 1971 models. These controls consist essentially of a sealed gas tank cap, a carburetor with no external vents, and lines from each of these evaporation sources to a carbon canister or to absorptive surfaces of the crankcase, to channel the vapors which otherwise would be released to the atmosphere. Again, this is a simple mechanical system. *Amici* are prepared to demonstrate

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[14]Paragraph 17 of the complaint charges in pertinent part that the auto manufacturers:

"(c) agreed to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment;

(1) in 1961 the defendants agreed among themselves to delay installation of 'positive crankcase ventilation' on vehicles for sale outside of California until the model year 1963, despite the fact that this antipollution device could have been installed nationally for the model year 1962 and that at least some automobile manufacturers expressed willingness to do so, in the absence of a contrary industry-wide agreement;

(2) in late 1962 and extending into 1963, the defendants agreed among themselves to delay installation of an improvement to the positive crankcase ventilation device, an improvement which the California Motor Vehicle Pollution Control Board had indicated it would make mandatory."

from documents now under protective order that the principles of this control have been known to the auto manufacturers for many years.

Exhaust Controls. Beginning with 1968 models, the auto manufacturers made minor modifications to their engines the primary effect of which is to permit them to run on leaner mixtures, that is, a higher ratio of air to fuel. This modification has resulted in reduction of CO and HC. Thus, while exhaust emissions are an auto pollution source which has not as yet been completely eliminated, they have been substantially reduced.[15]

The additional controls which are now needed on the exhaust system are precisely those which the manufacturers conspired to block. On April 2, 1971, General Motors advised the Environmental Protection Agency as follows:

> "The emission controls we have employed up to now generally have involved only the front side of the engine. * * * In evaluating the even more drastic reductions in emission levels required for the 1975 models, it is obvious that these engine modifications would have to be supplemented with control hardware on the exhaust side, which would do a final 'clean-up' job on both HC and CO.
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> * * *

[15] "The committee has found that the automotive industry has the capability for limiting the emissions of hydrocarbons and carbon monoxide from both the crankcase *and exhaust system* of gasoline powered motor vehicles * * *." (Emphasis Supplied.) *H.R. No. 728 on S. 780,* 90th Cong. 1st Sess., 1967 U.S. Code Cong. & Adm. News 1956, quoting S. Rept. No. 192, 89th Cong.

"In our basic 1975 emission control system, the catalytic converter would handle this 'clean up'.

* * *

"We do not have a proven catalytic converter at this time."[16]

The other two manufacturers, Ford and Chrysler, have both echoed these two points—that a catalytic converter is needed and that neither company has such a device at this time suitable for mass application.[17]

Defendants' alleged inability to produce effective exhaust devices flies in the face of the fact that four such devices developed by other companies were certified by California in 1964, and would have been installed the following autumn on 1966 models had not the auto manufacturers blocked this advance by hurriedly proposing engine modifications. This was the basis for one of the explicit charges made by the federal government in its civil complaint.[18]

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[16]A Progress Report by General Motors Corporation to U.S. Environmental Protection Agency, April 2, 1971, pp. 6, 7, 9.

[17]Ford Motor Co., Technical Report on Compliance with the Clean Air Amendments of 1970, Submission to Environmental Protection Agency, April 5, 1971, pp. 3, *et seq.* "Catalysts, all of which require lead-free fuel, are planned and under continuing development for 1975 models," p. 3.

Chrysler Corporation—Progress Report: Technical Effort Aimed at Compliance with 1975-76 Emission Standards Established by December 1970 Clean Air Act, April 1, 1971, pp. 8, *et seq.* "No production designs available," p. II-14.

[18]Paragraph 14 of the federal complaint reads in pertinent part as follows:

"(3) in early 1964 the defendants agreed among themselves to attempt to delay the introduction of new exhaust pollu-

(This footnote is continued on next page)

To sum up, the claim of "complex factual issues" made by defendants is no more than a chimera which could largely be disspelled by any competent auto mechanic. Many of the technical problems of retrofit relief have already been answered, and relatively little need be done to solve much of what remains. Control devices are now in production, and others have been certified after extensive testing as long ago as 1964. What is now required is that this Court rule on the basically legal issues of liability and relief, and then, perhaps with the aid of a master, order the auto companies to provide the retrofit relief which is possible by existing solutions—and which they conspired to delay.

II.

THIS COURT SHOULD ASSUME JURISDICTION IN ORDER TO PROVIDE THE MOST EXPEDITIOUS SOLUTION TO THE PROBLEM.

The overriding consideration in this litigation is that it is of the greatest national importance and urgently requires the promptest possible solution. The seriousness of the massive violation charged against defendants is amply attested by the number of sovereign states petitioning as plaintiffs and *amici* for prompt relief.

As a matter of practical wisdom *amici* believe that the earliest resolution of this problem can be achieved by this Court's assumption of jurisdiction. The history

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tion control measures on motor vehicles sold in California until the model year 1967; despite the fact that all were capable of installing the improvement for the model year 1966, the defendants agreed to tell California regulatory officials that installation of exhaust antipollution measures would be technologically impossible before 1967, and only under regulatory pressure made possible by competing device manufacturers not in the automotive industry did the defendants agree to a California regulatory requirement that exhaust devices be installed for the model year 1966:"

of the Docket 31 litigation thus far demonstrates this point. Well over a year has passed since the district court cases were consolidated on April 6, 1970. In this period *amici* believe that the district judge has exercised his judicial responsibilities commendably and with great skill, but within the limitations inherent in his jursdiction. The best example is the delay created by defendants' §1292(b) appeal. We do not quarrel here with the district court's determination that its ruling on controlling federal questions should be accorded interlocutory review, but had the ruling on these questions been made by this Court, this interlocutory step would have been unnecessary. The points would now have been settled.

Defendants have admitted that if they are required to repair the injury charged against them this will cost "amounts undoubtedly exceeding a billion dollars." (Br. in Opp. 22-23, n. 23.) In the belief that their exposure to the expense of retrofit lessens day by day "as the proportion of post-1967 cars increases" (Br. in Opp. 21), defendants are seeking to stretch out this litigation to the limit by interposing every possible legal defense and by seeking painstaking review at every possible level. But the very delay which decreases defendants' exposure to the cost of retrofit increases the nationwide contamination which plaintiffs and *amici* are suffering and are seeking to prevent.

Each day's delay in requiring the defendants to control emissions from vehicles now on the highways takes a toll in human life, health and property.[19]

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[19]In addition to problems of health, economic loss from air pollution is established at more than $1,720,000,000 annually. This figure includes $5,000,000 in agricultural and livestock losses alone. Middleton, *Air Pollution Control—New Controls in the Law*, 59 Kan. L.J. 644, 645-646 (1970). These figures

(This footnote is continued on next page)

There is no doubt that polluted air can kill. The relationship between air pollution and the incidence and prevalence of cardiovascular, pulmonary and respiratory diseases is direct and devastating.[20] Pollutants are a significant factor in the genesis of cancer,[21] in the development and aggravation of emphysema,[22] bronchitis,[23] and asthma.[24] They increase the mortality

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do not include aesthetic and other incalculable losses such as those resulting from irreversible damage to our national forests. See *e.g.*, California Department of Agriculture, *A Survey and Assessment of Air Pollution Damage to California Vegetation in 1970* (June 1971), pp. 24-25.

[20]Zeidberg, *et al., The Nashville Air Pollution Study: Mortality From Diseases of the Respiratory System In Relation to Air Pollution,* Arch. of Environmental Health 15:214-224 (Aug. 1967); Legislative History of the Air Quality Act of 1967, 1967 U.S. Code Cong. & Adm. News, 1941-1944 (hereafter Legislative History); and see generally University of California Task Force Assessments, Vol. II, *Project Clean Air* (1970) (hereafter Project Clean Air).

[21]Epstein, *Potential Carcinogenicity, Mutagenicity,* and *Teratogenicity Due to Community Air Pollutants, Project Clean Air,* Appendix M; Lave and Seskin, "*Air Pollution and Human Health,*" Science, Vol. 169, No. 3947 (August 21, 1970), pp. 723, 730 (hereafter Lave and Seskin).

[22]U.S. Dept. of Health, Education and Welfare, Public Health Service, *The Effects of Air Pollution* (Washington 1967), p. 5 (hereafter 1967 HEW Report); See also, *Ishikawa, et al., The Emphysema Profile in Two Mid-Western Cities in North America,* Arch. of Environmental Health, 18: 660-666 (1969); *Motley, et al., Effect of Polluted Los Angeles Air (Smog) on Lung Volume Measurements, Journal of the American Medical Association.* Vol. 171, No. 13 (Nov. 28, 1959), pp. 1475-1476. The HEW study shows that the death rate from emphysema in polluted urban areas is double the rate in areas where the air is clean. Since emphysema is second only to heart disease as a disease of men under the age of 65, it is clear that elimination of vehicular emissions will save the lives and improve the health of large numbers of persons.

[23]*Project Clean Air,* pp. 2-7 through 2-10.

[24]Lave and Seskin at 732; 1967 HEW Report at 5-6; Phelps *et al., Air Pollution Asthma Among Military Personnel in Japan, Journal of the American Medical Association,* Vol. 175, No. 11 (March 18, 1961), p. 990.

rate and the severity of cardiovascular diseases.[25] Moreover, their effect falls most heavily upon those least able to cope—the very old and the very young, and those already weakened by disease.[26]

It has been responsibly estimated that in the Los Angeles area alone, where automotive emissions are responsible for 88 to 90% of all air pollutants,[27] 100 to 500 deaths are attributable to air pollution *annually*.[28] During a similar period, symptoms of 50,000 to 500,000 persons suffering from a variety of diseases will be aggravated and virtually the entire population will suffer some interference with its well-being.[29] A 1970 survey of the research to date concludes that the mortality rate for lung cancer could be reduced by 25% and the morbidity and mortality rates for bronchitis by 25 to 50% were a 50% reduction in air pollution accomplished.[30]

It is commonplace that justice delayed is often justice denied. In few cases, however, is delay so clearly tantamount to denial in disadvantaging one party while benefiting its adversary. For here plaintiffs and their citizens suffer injury each day that defendants' conspiracy to withhold anti-pollution devices is unremedied; meanwhile defendants benefit since their ultimate duty

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[25]Cohen, *et al., Carbon Monoxide and Survival from Myocardial Infarction,* Arch. of Environmental Health, 19:510-517 (October, 1969).

[26]Legislative History at 1941; See also, Kilburn, *Human Cost of Polluted Air, Medical Times,* Vol. 98, No. 9 (Sept. 1970), p. 161.

[27]Los Angeles County Air Pollution Control District, *Profile of Air Pollution Control* (1971).

[28]Goldsmith, *The New Airborne Disease: Community Air Pollution, California Medical,* Vol. 113, No. 5 (Nov. 1970) p. 19.

[29]*Id.*

[30]Lave and Seskin at 730.

to retrofit is reduced as more and more cars built during the conspiracy period are taken off the road. Prompt relief in this case is of such national importance that the probability that the case will be expedited by the exercise of original jurisdiction is itself a "reason of practical wisdom" (*Wyandotte*, 401 U.S. at 499) sufficient to warrant this Court's retaining original jurisdiction.

Conclusion.

For these reasons, *amici* respectfully urge that this Court grant petitioners' motion for leave to file their bill of complaint.

Respectfully submitted,

[Signatures of States alphabetically]

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Attorney General of Alabama,

JOHN E. HAVELOCK,
Attorney General of Alaska,

EVELLE J. YOUNGER,
Attorney General of California,

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FRANCIS B. BURCH,
Attorney General of Maryland,

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ROBERT LIST,
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DAVID L. NORVELL,
Attorney General of New Mexico,

LOUIS J. LEFKOWITZ,
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LARRY DERRYBERRY,
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CRAWFORD C. MARTIN,
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DAVID I. SHAPIRO,
JEROME S. WAGSHAL,
Of Counsel.

MOTION FILED

SEP 16 1971

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1971

No. 45 Original

STATE OF WASHINGTON, STATE OF ILLINOIS, STATE OF ARIZONA, STATE OF COLORADO, STATE OF HAWAII, STATE OF IOWA, STATE OF KANSAS, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF OHIO, STATE OF RHODE ISLAND, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a Delaware corporation, FORD MOTOR COMPANY, a Delaware corporation, CHRYSLER CORPORATION, a Delaware corporation, AMERICAN MOTORS CORPORATION, a Maryland corporation, and AUTOMOBILE MANUFACTURERS ASSOCIATION, a New York corporation,

Defendants.

MOTION FOR LEAVE TO INTERVENE, PROPOSED COMPLAINT, AFFIDAVITS AND BRIEF IN SUPPORT THEREOF

Post Office Address:

274 Madison Avenue
New York, New York 10016

Counsel of Record:

MAXIMILIAN BADER
I. WALTON BADER
Attorneys for Heart Disease Research Foundation, et al.
Proposed Intervenor

TABLE OF CONTENTS

	PAGE
Motion for Leave to Intervene	1
Intervenors' Proposed Complaint	3
Affidavit of I. Walton Bader in Support of Motion for Intervention	20
Affidavit of Yoshiaki Omura in Support of Motion for Intervention	23
Brief in Support of Motion to Intervene	26
Question Presented	26
Facts	27
Argument—Intervenors should be permitted to intervene in this law suit	28
Conclusion	30
Certificate of Service	31

Cases Cited

Justice v. U. S., 365 Fed. 2nd 312	29
Mullins v. De Soto Securities Co., 2 FRD 502	29
Muesse v. Camp, 385 Fed. 2nd 694	29

Statute Cited

Federal Rules of Civil Procedure	
Rule 24	27, 29

Authority Cited

Rules of the Supreme Court of the United States:	
Rule 9(2)	28
Rule 9(6)	28

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. 45 ORIGINAL

STATE OF WASHINGTON, STATE OF ILLINOIS, STATE OF ARIZONA, STATE OF COLORADO, STATE OF HAWAII, STATE OF IOWA, STATE OF KANSAS, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF OHIO, STATE OF RHODE ISLAND, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a Delaware corporation, FORD MOTOR COMPANY, a Delaware corporation, CHRYSLER CORPORATION, a Delaware corporation, AMERICAN MOTORS CORPORATION, a Maryland corporation, and AUTOMOBILE MANUFACTURERS ASSOCIATION, a New York corporation,

Defendants.

MOTION FOR LEAVE TO INTERVENE

Heart Disease Research Foundation, a duly certified tax exempt charitable trust and the individual parties, Robert R. Peters and Henry Sassone, hereby move to intervene in the above-entitled original action pursuant to Rule 9(2) and 9(6) of the Rules of the Supreme Court of the United States and Rule 24 of the Federal Rules of Civil Procedure and to be heard orally on October 13, 1971.

Motion for Leave to Intervene

In support of this Motion there are submitted the following documents:

a—Proposed complaint.

b—Affidavit of I. Walton Bader, General Counsel and Trustee of the Heart Disease Research Foundation.

c—Affidavit of Yoshiaki Omura, M.D., Medical Director of the Heart Disease Research Foundation.

d—Brief in support of Motion for Intervention.

Dated: September 15, 1971.

Respectfully submitted,

MAXIMILIAN BADER
I. WALTON BADER
Attorneys for Proposed Intervenors
274 Madison Avenue
New York, New York 10016

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 45 ORIGINAL

STATE OF WASHINGTON, STATE OF ILLINOIS, STATE OF ARIZONA, STATE OF COLORADO, STATE OF HAWAII, STATE OF IOWA, STATE OF KANSAS, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF OHIO, STATE OF RHODE ISLAND, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a Delaware corporation, FORD MOTOR COMPANY, a Delaware corporation, CHRYSLER CORPORATION, a Delaware corporation, AMERICAN MOTORS CORPORATION, a Maryland corporation, and AUTOMOBILE MANUFACTURERS ASSOCIATION, a New York corporation,

Defendants.

HEART DISEASE RESEARCH FOUNDATION, a Charitable Trust of the State of New York, ROBERT R. PETERS and HENRY SASSONE, individually, and HEART DISEASE RESEARCH FOUNDATION and ROBERT R. PETERS and HENRY SASSONE, in behalf of all persons similarly situated and circumstanced,

Intervenors.

INTERVENORS' PROPOSED COMPLAINT

Intervenors' Proposed Complaint

CLASS ACTION

COUNT ONE

Intervenors allege:

1. Intervenor, Heart Disease Research Foundation is a Charitable Trust, duly organized and existing under the Laws of the State of New York, having its offices and places of business at 963 Essex Street, Brooklyn, New York, and 274 Madison Avenue, New York, New York.

2. Intervenor, Heart Disease Research Foundation, is a certified tax exempt organization under the Internal Revenue Code of the United States and is charged, under its Deed of Trust, to aid in alleviating the sufferings of mankind.

3. On information and belief, Defendants, General Motors Corporation, Chrysler Corporation, and Ford Motor Company are corporations duly organized and existing under the Laws of the State of Delaware, having offices and places of business within the territorial jurisdiction of the Southern District of New York.

4. On information and belief, Defendant, American Motors Corporation is a corporation duly organized and existing under the Laws of the State of Maryland, having offices and places of business within the territorial jurisdiction of the Southern District of New York.

5. Intervenors, Robert R. Peters and Henry Sassone, are citizens and residents of the State of New York residing in the New York metropolitan area. These Intervenors are also Trustees of the intervenor, Heart Disease Research Foundation.

Intervenors' Proposed Complaint

6. Pursuant to the original jurisdiction of this Court, the Plaintiffs herein have brought an action against the Defendants relating to the original jurisdiction of the Court pursuant to Article III, Section 2 of the Constitution of the United States and 28 U. S. C., Sec. 1251(b)(3).

7. In the original Complaint brought by the Plaintiffs against the Defendants herein, jurisdiction is also invoked under 15 U. S. C., Sec. 26 and 15 U. S. C., Sec. 1.

8. This Court acquires jurisdiction to entertain the Intervenors' Proposed Complaint pursuant to Rule 9(1) and Rule 9(6) of the Supreme Court of the United States and Rule 24 of the Federal Rules of Civil Procedure.

9. The claims asserted by the Intervenors herein constitute substantial and related claims to the claims asserted by the original Plaintiffs herein and this Court has jurisdiction to entertain said claims in principle of Pendent Jurisdiction.

10. The Intervenors herein are plaintiffs in an action in the United States District Court for the Southern District of New York (Civil Action 71 Civil 1667 HT). This suit alleges claims which are closely related to the claims in the instant action.

11. Representation of the rights of the Intervenors in this suit is, or may be, inadequate and Intervenors will, or may, be bound by a judgment in this action. In addition, there are common questions of law and fact involved in this action and in Intervenors pending action in the United States District Court for the Southern District of New York.

12. The inadequacy of representation of Intervenors' interests in the instant action is shown specifically by the following, without limitation:

a—Plaintiffs in this action merely seek an injunction to require the Defendants to cause to be installed as effective anti pollution control devices as could have been installed in motor vehicles but for the conspiracy alleged in the Complaint. There is no claim for damages including the large number of persons who have become ill or have died from related heart, lung, cancers, liver and kidney diseases. Without damages being awarded against these Defendants any injunction issued by this Court would be meaningless.

b—Despite the fact that automobile pollution has been directly implicated in the increasing cases of heart disease occurring in the United States, the Plaintiffs' Complaint makes no mention of heart disease whatsoever.

c—A Charity's intervention in these proceedings would ensure that any decree entered by this Court would be in the best public interests since the Intervenor-Charity has no "axe to grind" but is merely interested in improving the general welfare of the population of the United States.

d—The injunction sought by the Plaintiffs herein is inadequate. The injunction sought should also require that the Defendants herein devote at least 50% of their annual profits into anti pollution research.

e—In the proceedings before this Court, the Plaintiffs failed to point out that a normal District Court suit would not normally come to trial for at least two years. The subsequent appeals and possible review by this Court could take three years longer. While such proceedings were pending, any injunctive relief would probably be stayed and therefore no relief with respect to the constantly de-

teriorating quality of the air in the United States would be possible. On the other hand, this Court through its original jurisdiction, could clearly and easily dispose of this controversy within a matter of a few months, at most.

13. Intervenors bring this action both as individuals adversely affected by the acts alleged herein and as Trustees of a charitable Foundation whose aim is to alleviate the ills of mankind, particularly those relating to diseases of the heart.

14. There has been a substantial and significant increase in heart, lung, kidney and cancers disorders during the last generation. At the same time, automotive air pollution has consistently increased. In the metropolitan areas of the United States, automotive air pollution represents 75% of all air pollution and overall, the automobile represents 60% of air pollution.

15. The Intervenors further bring this action as representative of a Class pursuant to Rule 23 of the Federal Rules of Civil Procedure and the following sets forth the special circumstances warranting this type of suit:

a—The Members of the Class are the population of the United States residing in the metropolitan areas of the United States, amounting to approximately 125,000,000 persons and there are questions of law and fact common to the Class.

b—It is impractical to join all of the persons affected in one action because the class is so numerous.

c—The Intervenors represent, through their Board of Trustees, approximately four Members of the Class involved. However, by reason of the fact that the Inter-

venor, Heart Disease Research Foundation, is a Charitable Trust, it is uniquely situated to represent and fairly and adequately protect the interest of the Class. The claims of the representative parties are typical of the claim of the Class.

d—Adequate notice can be given to all of the Members of the Class by appropriate newspaper publicity.

e—Failure to permit this suit to proceed as a class action would cause inconsistent or varying adjudications with respect to individual members of the Class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or would substantially impair or impede their ability to protect their interest.

f—The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish standards of conduct for the party opposing the Class.

g—The questions of law or fact common to the Members of the Class predominate over any questions affecting only individual members and a class action is a superior method of resolving the controversies involved in this action.

16. The Intervenors herein, and all other parties similarly situated have been seriously affected by reasons of acts performed by said Defendants herein. These Defendants have been producing dangerous instrumentalities causing substantial injuries to the population of the United States residents and will continue to do so unless enjoined and restrained by this Court.

Intervenors' Proposed Complaint

17. The Intervenors believe that, on a financial basis, damages of one million dollars for every person so affected by pollution caused by these Defendants would be a reasonable measure of damages. This would amount to one hundred and twenty five trillion dollars, which is an amount far greater than the actual gross national production of the United States and probably equal to the value of all of the assets contained within the borders of the United States at the present time.

18. The above figures are submitted to indicate the reckless abandon with which these Defendants have been conducting themselves and the damages that they have caused to the population of the United States by their acts.

19. If the Defendants were required to embark upon a "crash program" of pollution reduction, the present air pollution crisis in the United States metropolitan areas would be substantially alleviated. The number of deaths from coronary insufficiency would be substantially reduced and the number of persons sustaining coronary attacks might be reduced by a factor of up to 90%. Those people suffering coronary attacks would attain a far better prognosis of recovery.

20. Unless relief is granted by this Court, the pollution levels in the United States will significantly increase within the next few years, further increasing the incidence of heart and lung diseases, shortening of life expectancies and other deleterious factors.

21. One of the solutions to the present problem would be to forthwith bar further manufacture of any vehicle with the internal combustion engine and require the De-

fendants forthwith to produce vehicles with alternative power means.

22. The corporations named below are made Defendants herein. Each of said corporations is organized and exists under the laws of the state indicated and has its principal place of business in the city indicated. Within the period of time covered by this complaint said Defendants have primarily engaged in the business of manufacturing and selling motor vehicles in various states of the United States and also manufacture and sell component parts and accessories thereto:

Defendant Corporation	*State of Incorporation*	*Principal Place of Business*
General Motors Corporation	Delaware	Detroit, Michigan
Ford Motors Company	Delaware	Dearborn, Michigan
Chrysler Corporation	Delaware	Highland Park, Michigan
American Motors Corporation	Maryland	Detroit, Michigan

23. Whenever in this complaint reference is made to any act, deed or transaction of a corporate defendant, such allegation shall be deemed to mean that said corporation engaged in said act, deed or transaction by or through its officers, directors, agents, or employees while they were actively engaged in the management, direction or control of corporate business affairs.

Intervenors' Proposed Complaint

Co-Conspirators

24. Various other persons, firms and corporations not made defendants herein have participated as co-conspirators with the Defendants in the offense charged in this complaint and have performed acts and made statements in furtherance thereof.

Definition

25. As used herein, the term "motor vehicle air pollution control equipment" means equipment, or any part thereof, designed for installation on a motor vehicle or any system or engine modification on a motor vehicle which is designed to cause a reduction of pollutants emitted from the vehicle, including, but not limited to, any device for the control of emissions of pollutants from the exhaust system, the crankcase, the carburetor, or the fuel tank.

Trade and Commerce

26. Automobiles for the most part are manufactured in the State of Michigan and are shipped therefrom to each of the fifty states of the United States. Some automobiles are assembled in various states of the United States from parts manufactured in the Sate of Michigan and other states. In 1966, 78,315,000 passenger cars and 15,864,000 trucks and buses, exclusive of off-the-road vehicles, were registered in the United States. In that year, 8,604,712 passenger cars valued at more than $17.5 billion and 1,791,587 commercial vehicles valued at more than $3.9 billion were produced in this country. Of the trucks produced, 96,560 were built with diesel motors.

Intervenors' Proposed Complaint

27. Since at least 1952, it has been established that motor vehicles contribute to air pollution by the emission of hydrocarbons, carbon monoxide, oxides of nitrogen and other contaminates.

28. As a result of new and continuing demands that automotive vehicles be equipped with air pollution control devices, a large and growing market for the production and installation of such devices has developed. Motor vehicle air pollution control devices are shipped in interstate commerce, both as original component equipment attached to motor vehicles and as replacements for existing components, from assembly points in various states to the Plaintiff states.

Violations Alleged

29. Beginning at least as early as 1953, and continuing thereafter up to and including the date of this complaint, the Defendants and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in motor vehicle air pollution control equipment.

30. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the Defendants and co-conspirators, the substantial terms of which have been and are:

a—to eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and

b—to eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment.

31. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the Defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

a—agreed that all industry efforts directed at the research, development, manufacture and installation of motor vehicle air pollution control equipment should be undertaken on a non-competitive basis;

b—agreed to seek joint appraisal of patents and patent rights submitted to any of them by persons not parties to a cross-licensing agreement entered into on July 1, 1955, and amended and renewed periodically, and agreed to require "most-favored-purchaser" treatment of all parties to the cross-licensing agreement if any one were licensed by a person not a party to that agreement;

c—agreed to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment;

(1) In 1961 the Defendants agreed among themselves to delay installation of "positive crankcase ventilation" on vehicles for sale outside of California until the model year 1963, despite the fact that this anti-pollution device could have been installed nationally for the model year 1962 and that at least some automobile manufacturers ex-

pressed willingness to do so, in the absence of a contrary industry-wide agreement;

(2) In late 1962, and extending into 1963, the Defendants agreed among themselves to delay installation of an improvement to the positive crankcase ventilation device, an improvement which the California Motor Vehicle Pollution Control Board had indicated it would make mandatory; and

d—agreed to restrict publicity relating to research and development efforts concerning the motor vehicle air pollution problem.

Effects of Conspiracy

32. The aforesaid combination and conspiracy has had, among other, the following effects:

a—Hindrance and delay in the research, development and manufacture—both by the Defendants and co-conspirators and by others not parties to the agreements alleged herein—and the installation of motor vehicle air pollution control equipment; and

b—Restriction and suppression of competition among the Defendants and co-conspirators in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and

c—Restriction and suppression of competition in the purchase of patents and patent rights covering motor vehicle air pollution control equipment.

d—The level of pollutants emitted into the ambient air by automobiles manufactured following the inception of

the conspiracy was, and is, substantially greater than the level which would have been attained but for the aforementioned agreement, combination and conspiracy with the result that the citizens of the Plaintiff States live in an unhealthy environment contaminated by humanly injurious atmospheric pollutants that have inflicted and continue to inflict upon very large numbers of such citizens great physical suffering, and actual physical injury induced or aggravated by such automotive pollutants.

e—The aforementioned hindrance and delays due to the restriction and suppression of competition in the research, development, manufacture and installation of pollution control devices have resulted in the continuous introduction of inadequate air pollution control devices as original and replacement equipment on motor vehicles purchased and used throughout the United States, despite the existence of technical capacity and knowledge sufficient to develop and produce effective air pollution control devices.

f—All of the Intervenors have been harmed by the Defendants as a result of the conspiracy herein described in that they have been subjected to live in an unhealthy environment contaminated by unnatural atmospheric pollutants emitted by motor vehicles manufactured by the Defendants.

(1) The Intervenors have been compelled to live in an unhealthy environment contaminated by humanly injurious atmospheric pollutants that have caused and continue to cause serious, cumulative and permanent impairment to the general health, comfort and welfare of such citizens.

(2) The quality of the air within the United States has been and continues to be significantly deteriorated to the detriment of the general economy and prosperity.

Fraudulent Concealment

33. Intervenors had no knowledge of the aforesaid combination and conspiracy, or of any fact which might have led to the discovery thereof prior to the instituting of proceedings by the United States of America against the Defendants herein on January 10, 1969. Intervenors could not have discovered the alleged combination and conspiracy at an earlier date by the exercise of due diligence since the combination and conspiracy set forth herein had been fraudulently concealed by Defendants by various means and methods used to avoid the detection thereof.

COUNT TWO

34. Intervenors repeat and reallege the allegations set forth in Paragraphs 1 through 33 of the foregoing Complaint as though fully set forth at length herein.

35. This Court acquires jurisdiction of this cause of action pursuant to the "general welfare" provisions of the Constitution of the United States and pursuant to the fact that this claim is a substantial and related claim to the claims set forth in Count One hereinabove.

36. This is a cause of action brought by the Intervenors in behalf of themselves and persons similarly situated for damages against the Defendants pursuant to common law principles of liability.

37. The Defendants, in continuing to manufacture motor vehicles containing internal combustion engines, are producing dangerous instrumentalities which are adversely affecting the health and welfare of the Intervenors and all

persons similarly situated by polluting the air of metropolitan areas with carbon monoxide, petrol chemicals and oxides of nitrogen.

38. As a result of these activities performed by the Defendants, the Intervenors and all persons similarly situated have become sick, lame, sore and disabled, have incurred medical and hospital expenses and will further incur other medical and hospital expenses and will have their life span shortended in the future.

COUNT THREE

39. Intervenors repeat and reallege the allegations set forth in Paragraphs 1 through 33 and 35 through 38 of the foregoing Complaint as though fully set forth at length herein.

40. Motor vehicles manufactured by the Defendants have in the past been and presently are so designed that noxious wastes and gases are released into the atmosphere in the course of ordinary operation of said motor vehicles.

41. Motor vehicles manufactured by the Defendants and operated on the highways of the United States are responsible for the emission into the atmosphere of the following contaminants: carbon monoxide, oxides of nitrogen, hydrocarbons, lead compounds and other toxic particles.

42. The emissions of contaminants as described above pollute the air and thereby constitute a danger to human health and welfare, in that a direct relationship has been established between the contaminants contained in motor vehicle emissions and chronic respiratory disease, carcino-

gens, liver and kidney disorders and a wide variety of tumors.

43. The aforesaid emissions which pollute the air as described above have resulted from the design and engineering of the motor vehicles manufactured by Defendants and which said Defendants have caused to be distributed throughout the United States.

44. The continued manufacture and distribution of motor vehicles as presently engineered and designed which cause the aforesaid unhealthy and dangerous emissions constitute a public nuisance contrary to the public policy of the federal government. 42 U. S. C., Sec. 1857 (4)(8).

45. WHEREFORE, Intervenors demand:

1. A perpetual injunction restraining the Defendants, their agents, servants and employees, forthwith, from manufacturing, selling or distributing any vehicle containing an internal combustion engine which pollutes the atmosphere with carbon monoxide, petrol chemicals and/or oxides of nitrogen.

2. A preliminary injunction, pending the trial of this action, restraining the Defendants, their agents, servants and employees, forthwith, from manufacturing, selling or disrtibuting any vehicle containing an internal combustion engine which pollutes the atmosphere with carbon monoxide, petrol chemicals and/or oxides of nitrogen.

3. A mandatory injunction requiring the Defendants to forthwith commit 50% of the gross profit made in the manufacture, sale and/or distribution of motor vehicles containing an internal combustion engine to a "crash program" designed to develop a non polluting power plant for motor vehicles.

4. A preliminary injunction pending the trial of this action, requiring the Defendants to forthwith commit 50% of the gross profit made in the manufacture, sale and/or distribution of motor vehicles containing an internal combustion engine to a "crash program" designed to develop a non polluting power plant for motor vehicles.

5. Damages in the sum of one hundred twenty five trillion dollars (trebled to three hundred and seventy five trillion dollars with respect to Count One) together with attorney's fee of three million dollars and the costs and disbursements of this action.

6. Such other, further and different relief as this Court may deem just and proper.

Dated: September 15, 1971.

Yours, etc.

By: I. Walton Bader

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 45 ORIGINAL

STATE OF WASHINGTON, STATE OF ILLINOIS, STATE OF ARIZONA, STATE OF COLORADO, STATE OF HAWAII, STATE OF IOWA, STATE OF KANSAS, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF OHIO, STATE OF RHODE ISLAND, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a Delaware corporation, FORD MOTOR COMPANY, a Delaware corporation, CHRYSLER CORPORATION, a Delaware corporation, AMERICAN MOTORS CORPORATION, a Maryland corporation, and AUTOMOBILE MANUFACTURERS ASSOCIATION, a New York corporation,

Defendants.

Affidavit of I. Walton Bader in Support of Motion for Intervention

State of New York
County of New York—ss.:

I. WALTON BADER, being duly sworn, deposes and says:

I am the General Counsel and a Trustee of the Heart Disease Research Foundation, a charitable trust duly

certified as a tax exempt foundation under the Internal Revenue Code.

The purpose of the Heart Disease Research Foundation is to ameliorate the ills of mankind, particularly those connected with diseases of the heart. As set forth in the accompanying affidavit of the Medical Director of the Foundation, the present levels of automotive air pollution may be directly implicated in the constantly increasing incidence of heart disease in the United States over the last generation.

The Heart Disease Research Foundation has commenced a law suit in the United States District Court for the Southern District of New York (Civil Action 71 Civil 1667 HT) seeking an injunction and damages by reason of the acts of the Defendants herein.

The undersigned believes that the Heart Disease Research Foundation, by reason of its status and charter, is entitled to intervene in this action, as a matter of right because representation of the interest of the applicant may be inadequately presented by present parties to this litigation and the proposed intervenors may be bound by a judgment rendered herein. In addition, the intervenors believe that the applicant's claim and the main action have a question of law or fact in common.

The undersigned further points out that permission by this Court for intervention on the part of the proposed intervenors will expedite the conclusion of the present litigation and will go far toward ameliorating the air pollution problems presently extant in the United States.

It is noted that the Plaintiffs herein merely seek an injunction without damages. It is submitted that relief by injunction would be completely inadequate. On the other

hand, if the Defendants are required to respond in damages and if the damages are to continue so long as vehicles produced by these Defendants continue to emit unacceptable levels of pollutants, the Defendants will make every effort to eliminate the pollution problem and should be successful.

WHEREFORE the undersigned prays that the present Motion to Intervene be in all respects granted.

I. WALTON BADER

Sworn to before me this
15 day of September 1971.

ANNE V. KELLY
Notary Public
State of New York

ANNE V. KELLY
Notary Public, State of New York
No. 41-2075515
Qualified in Queens County
Commission Expires March 30, 1973

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 45 ORIGINAL

STATE OF WASHINGTON, STATE OF ILLINOIS, STATE OF ARIZONA, STATE OF COLORADO, STATE OF HAWAII, STATE OF IOWA, STATE OF KANSAS, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF OHIO, STATE OF RHODE ISLAND, STATE OF VERMONT, and COMMONWEALTH OF VIRGINIA,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, a Delaware corporation, FORD MOTOR COMPANY, a Delaware corporation, CHRYSLER CORPORATION, a Delaware corporation, AMERICAN MOTORS CORPORATION, a Maryland corporation, and AUTOMOBILE MANUFACTURERS ASSOCIATION, a New York corporation,

Defendants.

Affidavit of Yoshiaki Omura in Support of Motion for Intervention

State of New York
County of New York—ss.:

YOSHIAKI OMURA, being duly sworn, deposes and says:

I am the Medical Director of the Heart Disease Research Foundation, a charitable trust duly certified as a tax exempt foundation under the Internal Revenue Code.

Affidavit of Yoshiaki Omura

I am a Doctor of Medicine (M. D.) and also am a Doctor of Science (Sc. D. Med.) and the degrees received from duly qualified medical schools. Prior to my appointment as Medical Director of the Heart Disease Research Foundation, I was an Assistant Professor at New York Medical College. I have written a number of research papers relating to heart conditions.

In my opinion, some of the increased acceleration and complications of cardiovascular and pulmonary ailments that have occurred in the last generation are directly connected with the increase in air pollution, particularly the type of air pollution caused by automobile exhausts, including, without limitation, carbon monoxide, petrol chemical hydrocarbons and oxides of nitrogen. In my opinion, it is necessary to preserve the public health of the population of the United States by immediately eliminating, or at least very substantially reducing, the present levels of automobile pollutants. In my opinion, the time table set by the United States Government under the "Clean Air Act" is a small progress but is insufficient and the result of continuing the present pollution of the air of the United States by reason of automobile emissions may result in serious health consequences particularly for the aged and for those suffering from cardiovascular and pulmonary diseases and for the future of the growing young generation who will be exposed to increased levels of such air pollution. In spite of the proposed cut in the amount of undesirable fumes from automobiles by the "Clean Air

Act", the increase in the number of cars in the future may sufficiently negate such a proposed cut.

YOSHIAKI OMURA

Sworn to before this
15 day of September 1971.

I. WALTON BADER
Notary Public

I. WALTON BADER
Notary Public, State of New York
No. 24-5140850
Qualified in Kings County
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. 45 ORIGINAL

STATE OF WASHINGTON, *et al.*,

Plaintiffs,

VS.

GENERAL MOTORS CORPORATION, *et al.*,

Defendants.

BRIEF IN SUPPORT OF MOTION TO INTERVENE

Question Presented

Seventeen States have petitioned this Court to entertain an original action against the four major motor vehicle manufacturers and the Automobile Manufacturers Association. The proposed complaint contains a first cause of action for antitrust law violation, a second cause of action for common law conspiracy, and a third cause of action for public nuisance.

The complaint does not seek damages but merely an injunction requiring the Defendants to produce anti pollution devices which will be of the same quality as those that would have been produced were it not for the antitrust conspiracy alleged.

The proposed Intervenors are two persons of the United States residing in metropolitan areas and adversely affected by pollutants produced by motor vehicles, and a Charitable Trust duly certified as a tax exempt entity under the Internal Revenue Code whose purpose is to alleviate the ills of mankind, particularly those caused by diseases of the heart.

These Intervenors have commenced a Civil Action in the United States District Court for the Southern District of New York seeking an injunction and damages against the Defendants (other than the Defendant, Automobile Manufacturers Association). Intervention is sought pursuant to Rule 24 of the Federal Rules of Civil Procedure.

Facts

Intervenor, Heart Disease Research Foundation, is a charitable trust duly organized and existing under the laws of the State of New York and duly certified as a tax exempt foundation under the Internal Revenue Code. Intervenors, Robert R. Peters and Henry Sassone, are Trustees of the Heart Disease Research Foundation and reside in the New York metropolitan area. The Intervenors filed a class action law suit in the United States District Court for the Southern District of New York seeking an injunction and damages in behalf of themselves and all persons similarly situated and circumstanced. The class action, as amended, consists of all residents in the metropolitan areas of the United States.

The Southern District law suit has not been consolidated under MDL Docket No. 31 because this suit was filed subsequent to April 6, 1970. Intervenors have been unaware of the pendency of this litigation and also discovered the same on September 3, 1971.

ARGUMENT

Intervenors should be permitted to intervene in this law suit.

In making this application the Intervenors assume that this Court will permit the filing of an original complaint in Original No. 45. This Motion, is, of course, conditional upon this Court granting the Plaintiffs' application. The Plaintiffs' application comes on for hearing on October 13, 1971 and the Intervenors respectfully request leave to argue orally in support of the Plaintiffs' application.

Assuming that this Court grants Plaintiffs' application to file a complaint, then this Court would have jurisdiction over Intervenors' cause of action on the ground of "Pendent Jurisdiction" since Intervenors' complaint is substantial and related to the complaint made by the Plaintiffs. It is further obvious that the disposition of this case will substantially affect the Intervenors' case now pending in the Southern District of New York. Indeed, while this case is pending, it would be very difficult for the Intervenors to go ahead with their District Court action since the disposition of this litigation would, in effect, control any litigation pending in a lower court. Furthermore, the period of time necessary to complete litigation through the lower courts would be a minimum of five years and, by that time, the adverse effects of air quality by reason of the acts of these Defendants would become insurmountable.

This Court, with respect to original actions has promulgated Rules 9(2) and 9(6) of the Rules of the Supreme Court of the United States. These rules make the Federal Rules of Civil Procedure applicable to original actions and therefore, Rule 24 of the Federal Rules of Civil

Procedure comes into play. This Rule reads in part as follows:

> "Rule 24. Intervention.
>
> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim of defense and the main action have a question of law or fact in common. * * * (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. * * *

It has been held that a rather wide discretion is granted to the Court to permit intervention. See, for example, *Mullins* v. *De Soto Securities Co.*, 2 FRD 502; *Justice* v. *U. S.*, 365 Fed. 2nd 312; and *Muesse* v. *Camp*, 385 Fed. 2nd 694.

In addition, to the above, it is respectfully pointed out that the intervention of a charitable foundation in this case would be most helpful to the Court. A charitable foundation is uniquely able to represent the public interest in a suit of this character and can be very helpful to

the Court in aiding the framing of appropriate relief. The Intervenor has no "axe to grind" but is interested primarily in improvement of the public health and elimination of automotive air pollution. The Individual Intervenors, while appearing as individuals for necessary jurisdictional purpose with respect to class actions are, nevertheless, primarily appearing as Trustees of a charitable foundation and also have the public interest in mind.

CONCLUSION

Intervenors' motion should in all respects be granted.

Dated: September 15, 1971.

Respectfully submitted,

By: I. WALTON BADER

MAXIMILIAN BADER,
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Certificate of Service

I hereby certify that on September 15, 1971, I served a copy of the foregoing Motion and accompanying documents, by mail, upon:

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Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
DEC 22 1971
E. ROBERT SEAVER, CLERK

STATE OF WASHINGTON, ET AL.,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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INDEX

	Page
INTRODUCTION AND SUMMARY	1
I. Following the principles of the recent *Wyandotte* decision, the Court should decline to assume original jurisdiction over the plaintiffs' proposed complaint	5
1. The Availability of Other Forums	6
2. The Technical and Political Complexity of the Cause	8
3. Special Disadvantages of Trial by this Court	13
II. The relief sought by plaintiffs herein is unnecessary and undesirable in light of the comprehensive legislative and administrative program, decisively strengthened by the Clean Air Amendments of 1970, for reducing vehicle emissions to a minimal level by a time certain	15
1. The Clean Air Amendments of 1970	16
2. The Impropriety of a Federal Judicial "Retrofit" Program	25
III. Plaintiffs' complaints in the district courts, and the proceedings currently in progress under the direction of the Multidistrict Litigation Panel, demonstrate that there is no necessity for this Court to exercise original jurisdiction over plaintiffs' proposed complaint herein	33
CONCLUSION	41
APPENDIX A	42
APPENDIX B	43

TABLE OF AUTHORITIES

Cases Page

Ames v. *Kansas*, 111 U.S. 449 (1884) 7
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959) 3, 14
Blonder-Tongue v. *University Foundation*, 402 U.S. 313 (1971) 15
Brown Shoe v. *United States*, 370 U.S. 294, 364 (1961) (Harlan, J.) 13
Case v. *Bowles*, 327 U.S. 92 (1946) 7
Conference of Studio Unions v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) 37
Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962) 14
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945) 7
Kansas v. *General Motors Corp.*, Civil No. T-4896 (D. Kan.) 34
La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 3, 12
Massachusetts v. *Missouri*, 308 U.S. 1 (1930) 7
In re Motor Vehicle Air Pollution Control Equipment, 311 F. Supp. 1349 (J.P.M.L. 1970) 13
North Dakota v. *Chicago & N.W. Ry.*, 257 U.S. 485 (1922) 7
Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (March 23, 1971) ..... *passim*
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 8
United States v. *California*, 297 U.S. 175 (1936) 7
United States v. *Louisiana*, 123 U.S. 32 (1887) 7
United States v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963) 13
Washington v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.) 8, 9, 34

Statutes

Federal

Act of October 20, 1965, Pub. L. No. 89-272, 79 Stat. 992 18
Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 18

INDEX

	Page
INTRODUCTION AND SUMMARY	1
I. Following the principles of the recent *Wyandotte* decision, the Court should decline to assume original jurisdiction over the plaintiffs' proposed complaint	5
1. The Availability of Other Forums	6
2. The Technical and Political Complexity of the Cause	8
3. Special Disadvantages of Trial by this Court	13
II. The relief sought by plaintiffs herein is unnecessary and undesirable in light of the comprehensive legislative and administrative program, decisively strengthened by the Clean Air Amendments of 1970, for reducing vehicle emissions to a minimal level by a time certain	15
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III. Plaintiffs' complaints in the district courts, and the proceedings currently in progress under the direction of the Multidistrict Litigation Panel, demonstrate that there is no necessity for this Court to exercise original jurisdiction over plaintiffs' proposed complaint herein	33
CONCLUSION	41
APPENDIX A	42
APPENDIX B	43

TABLE OF AUTHORITIES

Cases Page

Ames v. *Kansas*, 111 U.S. 449 (1884) 7
Beacon Theatres, Inc. v. *Westover*, 359 U.S. 500 (1959) 3, 14
Blonder-Tongue v. *University Foundation*, 402 U.S. 313 (1971) 15
Brown Shoe v. *United States*, 370 U.S. 294, 364 (1961) (Harlan, J.) 13
Case v. *Bowles*, 327 U.S. 92 (1946) 7
Conference of Studio Unions v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952) 37
Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962) 14
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945) 7
Kansas v. *General Motors Corp.*, Civil No. T-4896 (D. Kan.) 34
La Buy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 3, 12
Massachusetts v. *Missouri*, 308 U.S. 1 (1930) 7
In re Motor Vehicle Air Pollution Control Equipment, 311 F. Supp. 1349 (J.P.M.L. 1970) 13
North Dakota v. *Chicago & N.W. Ry.*, 257 U.S. 485 (1922) 7
Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (March 23, 1971) ..... *passim*
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 8
United States v. *California*, 297 U.S. 175 (1936) 7
United States v. *Louisiana*, 123 U.S. 32 (1887) 7
United States v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963) 13
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Statutes

Federal

Act of October 20, 1965, Pub. L. No. 89-272, 79 Stat. 992 18
Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 18

Page

Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 18
United States Code, Title 28, § 1292(b) (1970) 37
United States Code, Title 28, § 1407 (1970) 36
United States Code, Title 42, § 1857 *et seq.* (1970) .. 18
United States Code, Title 42, §§ 1857c-2, -5 (1970) .. 27
United States Code, Title 42, § 1857f-1(b) (1) (A) (1970) 19
United States Code, Title 42, § 1857f-1(b) (1) (B) (1970) 19
United States Code, Title 42, § 1857f-1(b) (4) (1970) 20
United States Code, Title 42, § 1857f-1(b) (5) (E) (1970) 20
United States Code, Title 42, § 1857f-6a(c) (1970) 27
United States Constitution, Article III, § 2 7

State of California

California Health & Safety Code, §§ 426.1, 426.5 18
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California Statutes, 1963, ch. 999, § 8, at 2267 11
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Other

Chicago, Ill., Amendment to Chapter 17 of the Municipal Code, Art. IIA, Nov. 29, 1971..... 28

Miscellaneous

Federal

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Page

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Page

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California Motor Vehicle Pollution Control Board, Resolutions 64-18, 64-19, 64-20 and 64-21 (August 12, 1964) 33

California Motor Vehicle Pollution Control Board, Resolution 64-36 (November 18, 1964) 33

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Page

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Other

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 45 Original

STATE OF WASHINGTON, ET AL.,
Plaintiffs,

VS.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

INTRODUCTION AND SUMMARY

On August 5, 1970, fifteen States (subsequently joined by three additional States) moved this Court for leave to file an original action for injunctive relief against the four major motor vehicle manufacturers and the Automobile Manufacturers Association. The complaint is in three counts, one under the federal antitrust laws, one under the "common law" of conspiracy in restraint of trade, and one under the state laws of public nuisance. The main relief sought is mandatory installation of emission controls in new and used vehicles.

Defendants filed a brief in opposition to the motion on October 6, 1970. On February 12, 1971,

plaintiff States filed a supplemental memorandum in support of the motion. On August 31, 1971, an *amicus* brief was filed by the City of New York and sixteen additional states, of which none is a plaintiff here but fourteen are plaintiffs in parallel federal district court actions. This Court has set plaintiffs' motion down for oral argument. 402 U.S. 940.

Defendants are filing this supplemental memorandum primarily to discuss three developments that have occurred since defendants' brief in opposition was filed: (1) this Court's decision of March 23, 1971, in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493; (2) enactment on December 31, 1970, of the Clean Air Amendments of 1970 and the administrative actions recently taken under that law; and (3) the filing by many of the plaintiffs, in March of 1971, of identical or substantially similar complaints in the federal district courts. We also respond herein to several of the assertions contained in the *amicus* brief filed by the sixteen additional States and the City of New York.

In Part I of this Memorandum we show that the instant case fully satisfies the two *Wyandotte* tests for declining jurisdiction over an original action between a State and the citizens of other States. First, there are a number of other impartial forums available, in which any or all of plaintiffs' claims can be (and in fact are being) tried as fairly and expeditiously as they could be in this Court. Second, the ongoing regulation of the problem of vehicle emissions by federal and state legislative and administrative bodies is a cogent "reason of practical wisdom" for this Court to decline to assume the trial court role.

There are other cogent reasons as well. Trial of the equity claims in this Court, before the damage claims based on identical allegations by many of these same plaintiffs are tried by juries in the district courts, would conflict with this Court's decision in *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959). And resort to a Special Master to conduct the trial, as plaintiffs suggest to get around this Court's obvious inability to sit as a trier of testimonial fact, would violate the salutary principles of *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

As we show in Part II, the Clean Air Amendments of 1970 completed the structure, begun in 1965, of a comprehensive federal legislative program for reducing vehicle emissions to a minimal level by a time certain. Administrative action to execute this program is well under way. In *Wyandotte* the mere possibility of legislative and administrative relief was an important reason for this Court to decline jurisdiction. Here a comprehensive program of legislative and administrative relief is an ongoing fact.

Amici tacitly concede that this program parallels the plaintiffs' request that this Court order emission controls installed on new vehicles. But they contend that the prayer for mandatory "retrofit" of control devices on used cars is not affected. As we further show in part II, for the Federal Judiciary to impose a retrofit obligation is not only impracticable but is also likely to conflict with the program of vehicle emission control adopted by Congress. In the Clean Air Act and its subsequent amendments, Congress deliberately focused the federal effort exclusively on new vehicle controls and reserved all questions of

retrofitting controls on used vehicles to the judgment and regulatory power of each of the States.

In Part III we show that plaintiffs here, by filing actions in the district courts alleging that those courts have jurisdiction of counts identical with all the counts in the instant complaint, have demonstrated the lack of any need to impose the burden of trying these complex cases upon the tightly-rationed time of this Court.[1] Nor is there any merit in the suggestion of *amici* that this Court must nevertheless assume jurisdiction of the proposed complaint in order to give the plaintiff States the opportunity to proceed jointly in a single action. If plaintiffs in fact believed (as defendants do not) that a joint trial of all their claims is feasible, nothing prevented the entire group of plaintiffs and *amici* from seeking that result by filing a joint complaint in a single district court, as eight of them in fact did.

We also show in Part III that the complaints of *amici* over the progress of the ongoing district court litigation are unfounded, and that defendants are doing more to expedite the evidentiary phase of the pretrial proceedings than are the plaintiffs.

In sum, trial of this complex litigation as an original action in the Supreme Court would offer no advantages over trial in the lower federal courts and, if

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[1] All the plaintiffs and fourteen of the seventeen *amici* here are plaintiffs in lower court antitrust actions arising out of the same subject matter as the original action sought to be instituted in this Court. Some of these lower court antitrust actions also involve "common law conspiracy" and "nuisance" claims identical with those in the instant complaint.

need be for any state law claims, in the state courts.[2] Whatever relief plaintiffs can obtain in this Court they can obtain in those courts. Trial of the cases here could be a severe strain on the resources of this Court, with no assurance whatever that the proceedings could be completed more justly, efficiently or expeditiously than by trial in the courts created for trial purposes followed, if needed, by appeal in the ordinary course.

I. Following the principles of the recent *Wyandotte* decision, the Court should decline to assume original jurisdiction over the plaintiffs' proposed complaint.

In *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (March 23, 1971), this Court declined to entertain Ohio's original action against American and Canadian chemical companies for pollution abatement.[3] The decision to decline jurisdiction was based on an analysis of the purpose of the Article III jurisdiction grant and on several practical considerations relating to the Court's paramount appellate role. The Court found that the policies underlying the grant of original jurisdiction were satisfied by the availability of an alternative and more desirable trial forum (401 U.S. at 500-01), and that substantial "reasons of practical wisdom" (*id.* at 499) for declining jurisdic-

[2] Plaintiffs may have no need to resort to their state courts, since a number of them have alleged in their district court complaints that these courts have pendent jurisdiction over the state law claims. See pp. 7-8, *infra*.

[3] The complaint sought to stop the introduction of mercury into Lake Erie; to require the defendants to remove from the Lake mercury already introduced, or provide funds to the state for such removal; and to recover damages for the harm done to the Lake.

tion were furnished by the activities of federal and local legislative and administrative bodies, better suited than the Supreme Court to deal with the complex technical and political problems raised by the complaint. 401 U.S. at 502-03.

The principles adhered to by this Court in *Wyandotte* apply with even greater force to the present motion.

1. *The Availability of Other Forums*

The Court in *Wyandotte* noted that Article III granted original jurisdiction to the Supreme Court in order to afford an impartial forum to a State seeking redress against citizens of another State where the courts of that other State might be—or appear to be—partial to their own citizens, and no other impartial forum was available. 401 U.S. at 500. In *Wyandotte*, where the complaint was grounded on an alleged violation of the state law of Ohio, the Court found that this Constitutional policy was not "implicated" by Ohio's complaint because at least one suitable alternative forum was, in fact, available—namely, Ohio's own state courts.

The instant case, of course, presents both federal and state law claims. As to the former, since plaintiffs plead a *federal* cause of action (namely, a violation of the federal antitrust statutes), the district courts have explicit jurisdiction over the antitrust claim. 28 U.S.C. § 1337 (1964). Where they had valid claims, many States have sought and obtained effective antitrust relief in actions filed in the district courts,[4] and as we discuss further in Part III below,

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[4] See cases cited in defendants' Br. in Opp. at 16, n.20. *Amici* repeatedly assert that a State unable to sue in its own courts (as on a federal antitrust claim) "should not be

the plaintiff States have now filed district court actions asserting the very same antitrust claim they present here. These suits, filed in the district courts of many plaintiff States by the States themselves, obviously do not subject the States to the risk of a forum biased in favor of the defendants.

As for the nuisance claim presented in the third count of the plaintiffs' complaint, it is obvious that a plethora of state court forums not partial to defendants is available. Plaintiffs' state law nuisance claim can clearly be filed in their own state courts. Plaintiff States have advanced no reason why they cannot, if they prefer, file this claim jointly in the state courts of a single plaintiff State.

Moreover, in the jurisdictional allegations of essentially identical district court complaints (treated more fully in Part III of this memorandum), a number of the plaintiffs here have pleaded that the same district courts hearing plaintiffs' antitrust claim have pendent jurisdiction to adjudicate the state nuisance law

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required to go anywhere else except this [Supreme] Court." Amici Br. at 9; also, at 6, 8. This is patently erroneous. It is well established that the availability of a federal district court affords a sufficient basis for this Court to decline to exercise its original jurisdiction. See *Massachusetts* v. *Missouri*, 308 U.S. 1, 19-20 (1930); *North Dakota* v. *Chicago & N.W. Ry.*, 257 U.S. 485 (1922). Cf. *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 464-68 (1945). See also *Case* v. *Bowles*, 327 U.S. 92, 97 (1946); *United States* v. *California*, 297 U.S. 175, 187 (1936); *United States* v. *Louisiana*, 123 U.S. 32 (1887); and *Ames* v. *Kansas*, 111 U.S. 449 (1884) (U.S. Const. Art. III, § 2, gives Supreme Court original but not exclusive jurisdiction of cases in which a State is a party). A contrary rule could substantially increase this Court's docket.

claim pleaded in the third count of the instant complaint. *E.g.*, *Washington* v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.), Complaint, Count III, para. 1-2. As these allegations suggest, the federal district courts are also available to try plaintiffs' nuisance claim if it and the federal antitrust claim both derive "from a common nucleus of operative fact," *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). If not, the state courts remain available.[5]

In sum, the first of the *Wyandotte* tests—availability of alternative forums not partial to the defendants—is fully satisfied here.

2. *The Technical and Political Complexity of the Cause*

The second *Wyandotte* test for deciding whether to exercise jurisdiction is the existence of "reasons of practical wisdom" which make the Supreme Court an inappropriate forum for this kind of original action. The Court in *Wyandotte* began by noting that

> "the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth." 401 U.S. at 501.

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[5] If plaintiffs' second count, based on the "common law" of conspiracy, states a claim under federal law (as plaintiffs evidently believe, plaintiffs' Br. at 14-15), then the district courts obviously have jurisdiction under 28 U.S.C. § 1331 (as plaintiffs have pleaded below, *e.g.*, *Washington* v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.), Complaint, Count II, para. 1, 2). If, however, plaintiffs' second count is based on state law (see defendants' Br. in Opp. at 12), then under the *Gibbs* test there would appear to be pendent jurisdiction in the district courts. *Id.*

The Court referred to the "complex technical and political matters that inhere in all disputes of the kind at hand" (*id.* at 502). It observed that these difficulties were "severely compounded" by the fact that "a number of official bodies are already actively involved in regulating the conduct complained of . . . ." *Id.* Consequently, the Court concluded:

> "In view of all this, granting Ohio's motion for leave to file would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis." 401 U.S. at 503.

Technical and political matters of even greater complexity inhere in the control of motor vehicle emissions. Although plaintiffs try to frame their case here in conventional antitrust terms, their principal effort is not to seek ordinary antitrust relief. Instead, what plaintiffs ask from this Court is a novel type of relief never before granted in an antitrust case. They seek a decree requiring defendants, *inter alia*, to (1) "adopt and pursue an accelerated program of spending, research and development" to produce "fully effective" emissions control devices or a "pollution free engine" (Complaint, Prayer, para. 2), and (2) install such control devices "as the Court deems reasonable and proper," at defendants' own expense, on all used cars built "during or following" the alleged conspiracy. *Id.*, para. 4.

As we demonstrate in Part II, any court attempting to grant and enforce such relief would thereby constitute itself as nothing less than a full-fledged regulatory agency, without the benefit of legislative standards or agency expertise. Leaving aside the

disputed question of the power of any court to grant such novel equitable relief, any such judicial intervention would be unnecessary and unwise in view of the ongoing efforts (described in Part II below) of the Legislative and Executive Branches of the Federal Government, along with the parallel efforts of the States, to grapple with the identical issues.

The factual and policy issues being resolved by these legislative and administrative bodies are substantially more "formidable" (401 U.S. at 503) than those from which the Court drew back in *Wyandotte*. Notwithstanding the efforts of *amici* here to suggest that vehicle emissions control (and especially "retrofitting") is a simple matter, the legislative and administrative bodies actually responsible for control programs have found the subject to be highly complex. The Environmental Protection Agency, for example, has stated in a recent report to Congress that "a major technological challenge" faces the motor vehicle industry in its efforts to meet the emissions standards for the coming years.[6]

Similarly, reports of the Department of Health, Education and Welfare have indicated the multitude of interacting technological considerations involved in vehicle emissions control,[7] and the experience of the

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[6] EPA, Annual Report to the Congress of the United States In Compliance With Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 1-9 (July 9, 1971). Extracts from this Report are reprinted for the convenience of the Court as Item 1 in the Separate Appendix to defendants' Supplemental Memorandum filed herewith.

[7] See, *e.g.*, HEW Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions from Mobile Sources, National Air Pollution Control Administration Publication No. AP-66 (1970). Extracts are printed as Item 2 of the Separate Appendix.

California legislature with retrofitting of crankcase emission controls is strong evidence of the complexity of the technical problems posed by vehicle emissions.[8]

Major antitrust cases usually require years of pretrial and trial proceedings, in which the documentary and testimonial strands of a decade or more of prior commercial and industrial activity are painstakingly unraveled. In the present cases, assuming plaintiffs have stated a claim upon which relief can be granted, this process will be complicated by the unusually complex and technical nature of the defendants' activities, involving a myriad of separate transactions relating to research, development and installation of many different kinds of emission control systems and devices. These cases deal not with traditional business practices of a settled industry, but with the frontiers of an arcane and still imperfectly understood technology, as they have advanced over a period of almost twenty years. Litigation of the present type presents great difficulties to *any* judicial tribunal. It is especially likely to overtax the resources

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[8] That experience, briefly stated, was that after the retrofit requirement was imposed, more than 20,000 complaints were received; that many vehicle owners reported "disastrous experiences" involving damage to their cars or exorbitant installation costs; and that the California legislature first suspended, and then sharply restricted, the retrofit requirement. See Transcript, Assembly [of the State of California] Interim Committee on Governmental Efficiency and Economy, August 7, 1964: Hearing on Motor Vehicle Repair and Smog Control Devices, at 1, 97; Assembly [of the State of California] Interim Committee Reports 1963-65, Vol. 8, No. 8, at 34; Cal. Stats., 1963, ch. 999, § 8, at 2267 (requiring retrofit); Cal. Stats., 1965, ch. 3, §§ 1, 2, at 872-73 (repealing requirement); Cal. Stats., 1965, ch. 2031, § 4, at 4609 (requiring retrofit only upon transfer of ownership). Relevant extracts from the foregoing materials are printed as Item 3 of the Separate Appendix.

of this Court, already strained by its increasing appellate responsibilities.

Nor is the technique of employing a Special Master to resolve complex factual issues, as plaintiffs suggest, one which this Court should be tempted to embrace. This Court observed in *Wyandotte* that it is basically "ill-equipped for the task of fact-finding," since it must necessarily function "without actually presiding over the introduction of evidence." 401 U.S. at 498. That handicap is especially disabling in the context of the present litigation, where the nature of the plaintiffs' antitrust claims—portraying an alleged conspiracy to delay and deceive—will require the triers of fact to hear extensive oral testimony and to base their determinations in substantial part upon their assessments of the credibility of live witnesses.

This Court has held that it was an abuse of discretion for a judge, assigned a much simpler antitrust trial than this one, to refer it for trial to a "temporary substitute appointed on an *ad hoc* basis." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259 (1957). Litigants, especially in complex antitrust cases, as the Court emphasized, are entitled to a trial presided over by the judge responsible for deciding the basic issues in the cause. It would hardly comport with the salutary decision in *La Buy* for the Court to accept original jurisdiction of the present action only to turn over all of the crucial testimonial aspects to a master of its own.[9]

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[9] Nor would such a course relieve the Court of the considerable burden of supervising the proceeding before the Master or reviewing his findings. A Master's findings and rulings do not have the force of law, and are merely recommendations to the Court. 5 J. Moore, Federal Practice ¶ 53.06 (2d ed. 1969).

3. *Special Disadvantages of Trial by this Court*

Amici urge that *Wyandotte* does not control the present case because plaintiffs' complaint here presents issues of federal antitrust law rather than local law. Amici Br. at 10-12. But this difference does not help plaintiffs, since it means that, as noted above, numerous additional impartial forums are available, namely, the various federal district courts, thus lessening the need for the exercise of original jurisdiction. In addition, it provides two other reasons why the Court should decline jurisdiction here.

This Court has previously expressed its dissatisfaction with the "great burden" imposed upon it by direct appeals from trial court antitrust decisions which "deprive [this Court] of the valuable assistance of the Court of Appeals." *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 175 n.1 (1963). In the instant case, not only would the Court be denied the benefit of an evaluation of the trial record and clarification of the issues by an intermediate appellate court, this Court would also be forced to make the trial court record itself, and to decide in the first instance the countless legal questions involved in the pretrial and trial phases of what the Judicial Panel on Multidistrict Litigation foresaw would become "the largest and most complicated" litigation ever to come before it.[10] The Congress has recognized that this role is inappropriate for the Supreme Court by creating a system of inferior federal courts and conferring upon them jurisdiction to try antitrust

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[10] *In re Motor Vehicle Air Pollution Control Equipment*, 311 F. Supp. 1349, 1350 (J.P.M.L. 1970); and see *Brown Shoe* v. *United States*, 370 U.S. 294, 364 (1961) (Harlan, J.).

cases (and, except in certain cases brought by the United States, to hear intermediate appeals). There is no reason to short-circuit this system here.

To the contrary, there is an important reason why short-circuiting this system would be particularly inappropriate. The antitrust count of the complaint, like the other two counts, seeks equitable relief only, and hence would be tried by the Court without a jury. This count, however, is also the basis for damage claims by these same plaintiffs (and others) in the actions which all of them have filed in the district courts. Under the doctrine of *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), the claims for equitable relief which all these district court complaints also contain could not be tried separately to a judge before the damage claims are tried to juries, because to do so would prejudice defendants' Seventh Amendment right to jury trial of the damage claims.[11] For this Court to try the equitable claims presented in the first count of the instant complaint before the trial of the damage claims presented in the plaintiffs' district court complaints would be equally violative of defendants' rights.

Quite aside from the question of whether and to what extent this Court's findings and judgment in the instant action would be technically binding on the defendants in a later trial of the district court damage claims, they would, as a practical matter, have

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[11] See *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); 5 J. Moore, Federal Practice ¶ 38.19[2] at 170, ¶ 38.37[2] at 299 n.13 (text & supp.) (2d ed. 1969); 2 Barron & Holtzoff, Federal Practice and Procedure § 894, at 82-85 (Wright ed. 1961).

a powerful and perhaps controlling effect.[12] And if this Court may not properly try the equitable claims of the present action before the district court damage claims are tried, there is plainly no point to accepting original jurisdiction, particularly since, as noted above, the district court complaints also include prayers for equitable relief overlapping the relief sought in this original action.

In *Wyandotte* this Court held that only the "strictest necessity" (401 U.S. at 505) would justify the Court's assumption of original jurisdiction over an interstate pollution case. Given the availability of many alternative forums, the difficulties of trying the case as an original Supreme Court action, and the activity of other competent governmental authorities, the element of necessity was found "totally lacking" in *Wyandotte*. *Id.* at 505. For similar reasons, it is equally absent in the case at bar.

II. The relief sought by plaintiffs herein is unnecessary and undesirable in light of the comprehensive legislative and administrative program, decisively strengthened by the Clean Air Amendments of 1970, for reducing vehicle emissions to a minimal level by a time certain.

In our earlier brief, we described the comprehensive pattern of emerging federal and state regulation

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[12] See *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 320-27, 329-30 (May 3, 1971). Not only the plaintiffs and *amici* States, but numerous other governmental bodies and classes of private citizens have filed identical damage complaints in the district courts, and defendants' right to jury trial of the antitrust issues in these damage cases might also be prejudiced if this Court decided the original action first.

of motor vehicle emissions. We discussed the difficulties in reconciling plaintiffs' prayers for mandatory injunctive relief in this action with the dictates of the legislative program for emission control. *See* Br. in Opp. at 2-6, 20-24. Since that brief was filed, the Congress has passed and the President has signed the Clean Air Amendments of 1970, imposing drastic new emission control standards. The Environmental Protection Agency has begun to implement these requirements in detailed regulations.[13] These measures express and execute the best judgment of the Legislative and Executive Branches as to the steps necessary at the federal level to serve the public interest in the control of automobile emissions.

In *Wyandotte*, the mere possibility of some legislative relief was an important element in the Court's decision to decline to exercise its original jurisdiction. 401 U.S. at 502-03. Here a far-reaching and definitive legislative program is an accomplished fact. The complex task of administering the program is well under way. There is no occasion for this Court to depart from the principles it so recently reaffirmed.

1. *The Clean Air Amendments of 1970*

For a full understanding, the Clean Air Amendments of 1970 must be placed in their proper historical framework.

> "When the first federal air pollution control legislation was passed in 1955 [authorizing funds for research and related activities by the Public Health Service], there were no viable ongoing State programs at all. There was little interest

[13] See, *e.g.*, 36 Fed. Reg. 12652 *et seq.*, 12657 *et seq.*, 16905-06, 19697 (1971).

in the scientific community, and the public, by and large, equated air pollution with coal smoke and considered smog a problem unique to Los Angeles. It is no wonder that air pollution is regarded as a recently discovered phenomenon." Council on Environmental Quality, First Annual Report, *Environmental Quality* 62 (1970); see also, *id.* at 73-75.

In Los Angeles in 1953, after six years of regulating stationary sources, it was recognized that the automobile contributed significantly to the Los Angeles pollution problem.[14] That problem, termed "smog," was the result of a chemical reaction between unburned hydrocarbons—largely unburned gasoline—and nitrogen oxides, the latter being a chemical formed in every flame through the combination of the oxygen and the nitrogen in the air.

Commencing in 1953, the County of Los Angeles sought the assistance of the auto industry in an attempt to find a solution, and the industry responded by initiating the cooperative research and development program here under attack.[15] The first problem tackled was the development of measurement techniques and instrumentation. At the urging of

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[14] Report of the Subcommittee of the Assembly [of the State of California] Interim Committee on Governmental Efficiency and Economy, Study and Analysis of the Facts Pertaining to Air Pollution Control in Los Angeles County 14 (1953). Relevant excerpts from sources cited herein relating to the early history of vehicle emissions control in California are printed as Item 4 of the Separate Appendix.

[15] Report of the Assembly [of the State of California] Interim Committee on Transportation and Commerce, Motor Vehicle and Highway Problems 45 (Assembly Interim Committee Reports 1957-59, Vol. 3, No. 6, 1959).

the California authorities, the industry directed its efforts toward the development of "deceleration devices." When it was learned, however, that emissions during deceleration were a much smaller portion of total vehicle emissions than had been supposed, Los Angeles County declined to require installation of the devices.[16]

With the passage of time, the legislative emphasis shifted from the County to the State. Through the work of legislative committees, which sought and obtained the advice of industry committees, the necessity of defining the degree of control required was established. Standards were fixed, both for air quality and for auto exhaust emissions. This activity marked the start of regulation of automotive emissions.[17]

By 1965, interest in air pollution had become nationwide. Federal legislation relating, *inter alia*, to vehicle emissions was enacted in 1965, in 1967, and again in 1970.[18] Legislation prior to the 1970 Amendments is summarized in our earlier brief. In general, it directed the administrative establishment of "criteria" for air quality and the adoption of regu-

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[16] *Id.*; Transcript, Assembly [of the State of California] Interim Committee on Transportation and Commerce, December 1, 1958: Hearing on Automotive Smog Control, at 3-4.

[17] Cal. Stats. 1959, ch. 200, § 1, at 2091; Cal. Health & Safety Code, §§ 426.1, 426.5.

[18] Act of October 20, 1965, Pub. L. No. 89-272, 79 Stat. 992; Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676. These provisions are codified at 42 U.S.C. § 1857 *et seq.* (1970).

lations fixing permissible levels of automotive emissions.

The 1970 Clean Air Amendments go beyond preexisting law in one critical respect: they establish what their principal author described as a final "deadline for the cleanup of the internal combustion engine in the passenger automobile." [19] The effect of the 1970 Amendments is to prohibit the sale of 1975 or later model-year motor vehicles which fail to reduce emissions of carbon monoxide and hydrocarbons to a level 97-98% below the emissions from uncontrolled vehicles.[20] As to emissions of oxides of nitrogen, 1976 and later model year vehicles must meet a comparable standard.[21] The spelling out of the standards and supervision of the automotive industry's compliance are entrusted to the Administrator of the Environmental Protection Agency, who is required to report annually to the Congress and to make "any

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[19] See 116 Cong. Rec. S20599 (daily ed. Dec. 18, 1970) (remarks of Senator Muskie).

[20] The Amendments require that the 1975 model vehicles meet emission standards for hydrocarbons and carbon monoxide 90% more stringent than the standards in force for 1970 vehicles. 42 U.S.C. § 1857f-1(b)(1)(A) (1970). The 1970 standards reduced hydrocarbons by almost three-quarters and carbon monoxide by about two-thirds in relation to uncontrolled vehicles. EPA, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 2-2 and 2-3 (July 9, 1971). Thus, the effect of the Amendments is to mandate reductions of approximately 98% for hydrocarbons and 97% for carbon monoxide. *Id.*, Fig. 1, at 6-2.

[21] 42 U.S.C. § 1857f-1(b)(1)(B) (1970).

recommendations for additional congressional action necessary to achieve the purposes of" the Act.[22]

As a practical matter, no decree that might be issued by this Court could reasonably be expected to replace, modify, or accelerate the imposition of the standards mandated by the Amended Act. We say this for three reasons. In the first place, the new standards are scheduled to be imposed within less than three years. Unless the law is amended, they *must* be imposed, assuming the longest extension permissible, within four.[23] It is highly unlikely that an original proceeding in this Court could result in a final decree by that time.[24]

In the second place, Congress acted with full awareness that the automotive industry did not possess the technology required to meet the new standards.[25] The 1970 Amendments were literally a demand that the industry "do the impossible" within a stated period (very much, as one Senator observed, in the manner of the Apollo program to put a man

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[22] 42 U.S.C. § 1857f-1(b)(4) (1970).

[23] The Administrator is statutorily prohibited from extending the effective date of the new standards for more than one year. 42 U.S.C. § 1857f-1(b)(5)(E) (1970).

[24] A useful chronology of original actions entertained by this Court appears in Note, *The Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665, 701 *et seq.* (1959). A great number of them have required more than four years.

[25] See 116 Cong. Rec. S16093 (daily ed. Sept. 21, 1970) (remarks of Senator Muskie): "[I]f we thought the technology existed today [to meet the new standards] we would insist that it be incorporated in these cars today."

on the moon).[26] The 1970 Amendments were candidly designed to insure a maximum effort to solve the problem of vehicle pollution forthwith, regardless of the amounts of money and manpower required. It is difficult to see how the judiciary can be expected to order more.

Third, as noted above (pp. 9-11, *supra*), the establishment and enforcement of rules for the control of vehicle emissions are tasks far better suited to the legislative and administrative process than to "common law" case-by-case decisions of the judiciary. Effective vehicle emissions control requires the fact-gathering, policy-evaluation and rule-making capabilities of legislatures and administrative agencies. Courts are not equipped to make the policy trade-offs between, for example, more carbon monoxide emissions but less emissions of oxides of nitrogen.[27] Courts do not usually have before them all the parties interested in, and affected by, the solutions to a social problem of this type.[28] Where a comprehen-

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[26] See 116 Cong. Rec. S16258 (daily ed. Sept. 22, 1970) (remarks of Senator McIntyre).

[27] See EPA, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 1-9 (July 9, 1971):

> "One of the unfortunate aspects of motor vehicle emission control is that reducing levels of hydrocarbons and carbon monoxide, which is done primarily through increasing the efficiency of combustion, tends to make more difficult the control of oxides of nitrogen, whose formation is largely a function of heat combustion."

See also p. 28 n.37, *infra*.

[28] For example, the statute contemplates that as a matter of competitive fairness, standards and the means for measur-

sive regulatory scheme for the control of vehicle emissions has already been established, there is no need to rely on the *ad hoc* equitable powers of this Court or any other court over the particular defendants before it.

Nevertheless, in an effort to induce this Court to substitute a judicial emissions control program for that adopted by Congress, *amici* carefully cultivate the widespread misimpression that the motor vehicle is almost entirely responsible for the damage to health and property caused by air pollution, and that alleged violations of the antitrust laws by the motor vehicle manufacturers are responsible for the fact that the problem of air pollution has not been solved. *Amici* Br. at 27-30. None of this is true.

While transportation of all types is currently estimated to be the source of 51% of U.S. air pollution *on a weight basis*,[29] transportation generally, and motor vehicles in particular, are responsible for a much smaller fraction of total air pollution *on an environmental effects basis*. Using California air quality standards as the basis for measuring the environmental impact of each of the major air pollu-

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ing compliance must be uniform for all manufacturers of like vehicles. Yet many of the world's largest vehicle manufacturers, occupying substantial positions in the United States market, are not defendants in the present actions.

[29] Council on Environmental Quality, Second Annual Report, *Environmental Quality* 212 (1971). The contribution of automotive vehicles (cars, trucks, buses) is estimated, as of 1968, at 38.8%. See HEW, Nationwide Inventory of Air Pollutant Emissions, 1968, National Air Pollution Control Administration Publication No. AP-73 (1970) (computed from Tables 2, 4, 7, 9 and 11).

tants, two University of California researchers have placed the contribution of motor vehicles to total U.S. air pollution at only 12%.[30] While motor vehicles are a major source of pollution even on an environmental effects-basis in Los Angeles and some other cities where hot, dry, stagnant air and sun-

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[30] See Letter from Robert F. Sawyer and Lawrence S. Caretto (Dept. of Mechanical Engineering, University of California at Berkeley), "Air pollution sources reevaluated," 4 Environmental Science & Technology 453 (1970). The other contributors to air pollution are, on an environmental effects basis, industry—37%; power plants—36%; space-heating—10%; and refuse disposal—5%. Another academic study, using air quality criteria (the "pindex" method) and the earlier high tonnage figure for transportation, found transportation responsible for 19% of U.S. emissions, behind the industrial and electric power generation categories. *Babcock, A Combined Pollution Index For Measurement of Total Air Pollution,* 20 J. of Air Pollut. Control Ass'n 653 (1970).

The difference in the weight vs. effects measurements of vehicle emissions is primarily due to the automobile's relatively high emission of carbon monoxide, which is the least noxious of air pollutants on a mass-for-mass basis, and its minimal emission of sulfur oxides, a pollutant more than one hundred times as noxious as carbon monoxide. Eisenbud, *Environmental Protection in the City of New York,* 170 Science 706, 707 (1970); Sawyer & Caretto, *supra.*

The Council on Environmental Quality has recognized the misleading character of weight measurements of air pollutants and the importance of considering the effects of particular pollutants and their geographical distribution. See Council on Environmental Quality, Second Annual Report, *Environmental Quality* 213 (1971).

shine are common, most cities do not have this problem.[31]

Moreover, the national failure to appreciate the environmental implications of vehicle and other emissions at an early date cannot fairly be ascribed to the vehicle manufacturers alone. As the Council on Environmental Quality has explained, the failure is plainly a social and political one, growing out of the national commitment to economic growth and the public preferences for the increasing urbanization, industrialization and personal mobility that technology can provide.[32] Effective remedies for vehicle emissions have at all times depended upon a public decision to require development of emissions controls and, most importantly, to accept the very real economic and social costs of such a program. That decision has now been made and is in process of implementation by the regulatory agencies that Congress and the States have entrusted with the job.

Whether this essentially political decision could have been made earlier, and whether the technological obstacles to developing effective vehicle emissions

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[31] Eisenbud, *supra;* Sawyer & Caretto, *supra.* The principal ingredients of photochemical ("Los Angeles type") smog are hydrocarbons, oxides of nitrogen and sunlight, while "London type" smog is principally composed of the sulfur dioxide and particulates found in smoke and fumes from burning coal and oil. Chicago, for example, has London-type smog about one-third of the days of the year, and photochemical smog less than one per cent of the time. It is, of course, local differences of this kind which caused Congress to leave the control of used car emissions to the States.

[32] See Council on Environmental Quality, First Annual Report, *Environmental Quality* 12-16 (1970). Excerpts from this report are reprinted as Item 5 of the Separate Appendix.

control systems could have been surmounted more rapidly, are necessarily matters of conjecture which no court can possibly resolve. It is clear, however, that the alleged actions and omissions of the vehicle manufacturers—even if they had occurred—could have been no more than one contributing factor among many that were far more significant.[33]

2. *The Impropriety of a Federal Judicial "Retrofit" Program*

Amici strenuously urge that nothing in the emissions control program established by the Clean Air Act bars "retrofitting" (installing emissions control systems on used cars), and that retrofitting, at least, is a form of relief that the Court could and should order. Amici Br. *passim*, esp. at 21-26. In *amici's*

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[33] For example, the one specific allegation of delay in the complaint herein charges the defendants with having agreed to delay the installation of a crankcase ventilation valve on some new 1962 model year vehicles (and to delay an improvement thereon "in late 1962 and extending into 1963"). Complaint, para. 17(c)(1), (2). But the entire motor vehicle population accounts for less than half of the total annual hydrocarbon emissions in the U.S.; the crankcase accounts for only one-fifth of the automotive hydrocarbons emissions from an uncontrolled vehicle (and essentially no carbon monoxide or oxides of nitrogen); and the number of vehicles produced in any one model year is only about one-tenth of the total number of cars on the road. So the alleged delay could have affected no more than one one-hundredth of the total annual U. S. hydrocarbon emissions—or between one and two one-thousandths of total annual emissions of all known types of pollutants (since hydrocarbons represent only 15% by weight of total emissions). See HEW, Nationwide Inventory of Air Pollutant Emissions, 1968, National Air Pollution Control Administration Publication No. AP-73, at 3, 13 (1970); HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emis-

view, because "there is no federal regulation covering emissions on used cars or retrofitting," therefore "retrofit is solely a matter of judicial concern." *Id.* at 15. Several important omissions and over-simplifications render the argument wholly untenable.

In the first place, *amici* fail to note that in the Clean Air Act the Congress advertently left the problem of used car emission controls to the judgment and powers of the several States. In considering the Clean Air Amendments of 1970, Congress explicitly considered and rejected the proposal, reintroduced by plaintiffs here, for a federally-imposed retrofit program:

> "In considering alternative means of controlling emissions of air pollution agents from *used* vehicles, the Committee was unable to develop a feasible national system. The Committee rejected ideas ranging from the *imposition of a retroactive installation obligation on automobile manufacturers* to a Federal subsidy program." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 13 (1970) (emphasis added).

The Senate Committee went on to state:

> "The Committee believes at this time that regulations relative to the retroactive application of emission control devices and methods is *manageable only at the State and regional level* and expects and hopes that the regions and States

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sions From Mobile Sources, National Air Pollution Control Administration Publication No. AP-66 (1970), at 2-12; Automobile Manufacturers Association, 1971 Automobile Facts and Figures, at 22. This small fraction would be even smaller on an environmental-effects basis. See pp. 22-23 & n.30, *supra*.

will be innovative in this area." *Id.*, at 13-14 (emphasis added).

For this Court to attempt to establish a particular retrofit program by federal judicial fiat would be fundamentally inconsistent with the Congressional scheme, and in disregard of the legislative findings as to the inadvisability of federal action in this area.

The Clean Air Act makes the States responsible for adopting and enforcing implementation plans to bring local air into compliance with the regional air quality standards.[34] As one part of this regulatory scheme, the power to regulate used car emissions is reserved to the States.[35] And the various kinds of requirements relating to used car emissions that different States may find feasible, appropriate and acceptable to their citizens may diverge radically from the used vehicle control requirements that plaintiffs would have this Court impose.[36] For example, because of the fact that measures reducing hydrocarbon emissions from used cars may increase emissions of nitrogen oxides, and *vice versa*, two different States may choose two entirely different kinds of used car control programs (or none at all), depending on local

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[34] 42 U.S.C. §§ 1857c-2, -5 (1970).

[35] 42 U.S.C. § 1857f-6a(c) (1970); S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967).

[36] For example, in 1963 California required that crankcase emission controls be installed within ten months beginning January 1, 1965, on used as well as new cars, but the requirement for used cars was first suspended, and then sharply restricted, before 1965 was over because it had "caused great concern and confusion throughout the state." Cal. Stats., 1965, ch. 3, § 3, at 873. See p. 11 & n.8, *supra*.

air conditions, population density, and other variables.[37]

Secondly, in their enthusiasm for a nationwide, judicially-imposed retrofit obligation, *amici* do not discuss the extent to which the imposition of this obligation on the manufacturers as to used cars would

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[37] For example, the California Air Resources Board reported to the State legislature in July of this year that it would not recommend establishment of a system of mandatory inspection and maintenance of used vehicles, in part because while such a system would reduce hydrocarbon emissions, it would increase oxides of nitrogen. See California Air Resources Board, A Report to the Legislature on Vehicle Emission Inspection (July 1, 1971). While rejecting inspection to control hydrocarbons, California has adopted a retrofit law designed to reduce oxides of nitrogen. See Los Angeles Times, Nov. 16, 1971, Pt. II, at 6, reporting enactment of S.B. 578. In contrast, the City of Chicago has adopted mandatory inspection aimed only at hydrocarbons and carbon monoxide. Chicago, Ill., Amendment to Chapter 17 of the Municipal Code, Art. IIA, Nov. 29, 1971. The State of New Jersey is evidently adopting a similar inspection program, also not involving nitrogen oxides standards. See New Jersey State Department of Environmental Protection, Notice of Public Hearing on Air Pollution Control Code, Proposed Chapter 15 (May 27, 1971). Excerpts from the foregoing materials are reprinted as Item 6 in the Separate Appendix.

For further elucidation of the conflict between controlling hydrocarbon emissions and controlling nitrogen oxide emissions, see HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions from Mobile Sources, National Air Pollution Control Administration Publication No. AP-66 (1970), extracts from which are contained in Item 2 of the Separate Appendix, and Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, *Air Pollution—1967 (Automotive Air Pollution)*, 90th Cong., 1st Sess. Pt. 1, at 238-41, 326 *et seq.*, 470 (1967).

actually conflict with the Congressionally-imposed obligation to create essentially pollution-free new automobiles by 1975. Senator Muskie, the principal architect of the Clean Air Amendments, explained the Congressional treatment of the new car-used car problem as follows:

> "There is a tendency to focus upon the new car provisions in the bill, and understandably so. Nevertheless, *what really moved the committee, the Senate, and the conferees to go in the direction of a tough deadline for new cars is the fact that there are used cars,* and the used car population creates a problem." 116 Cong. Rec. S20602 (daily ed., Dec. 18, 1970) (emphasis added).

Stating that these used cars are "beyond the reach, really, of any effective technological control development," the Senator went on to say that "to deal with the used car problem, we need a new car deadline in order to begin the process of cleaning up new used cars" that come onto the streets each year. *Id.* at S20602-03.

Rather than invoke federal power to require partially effective retrofit devices, Congress opted for fully effective new car controls. Before any court were to order the defendants to divert their resources and energies into a massive retrofit program, it would certainly have to consider the effect of such an order on the ability of each one of the several vehicle manufacturers to meet the new car deadlines that Congress preferred as the federally-imposed solution of the problem. At present, the Environmental Protection Agency is "moderately optimistic" that the vehicle manufacturers can overcome the "major technological challenge" facing them and meet the 1975

standards on schedule.[38] A massive judicial retrofit program could substantially and adversely affect the basis for this moderate optimism.

Any court contemplating such a departure from the Congressional choice would also have to consider whether independent automobile dealers and gas station operators have the necessary trained manpower and skills to install and maintain the particular kinds of retrofit devices involved, whether the necessary degree of public cooperation with the retrofit program could be obtained, and whether the time required for manufacture and installation of the devices would in any event take so many years that the beneficial effect on overall emission levels would be minimal.[39]

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[38] EPA, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 1-9, 1-10, and 5-17 (July 9, 1971).

[39] Additionally, before ordering retrofit at defendants' expense, the court would have to consider that even if plaintiffs' theory were correct and that, absent the alleged violation, some of the defendants would have introduced some control devices earlier, the cost of these devices would have been reflected in the prices defendants charged for their vehicles. Some of the defendant companies have in fact developed and test-marketed certain types of retrofit devices at moderate prices, but with total lack of market success. The reason, undoubtedly, is that to the average automobile owner, an emissions control device is, in economic terms, an "externality" that he does not perceive as worth the price in benefits to him, and that, if given a market choice, he will not purchase. See, *e.g.*, P. Samuelson, Economics 791-92 (8th ed. 1970); Gerhardt, *Incentives to Air Pollution Control*, 33 Law & Contemp. Prob. 358 (1968); Report of the Panel on Electrically Powered Vehicles to the Commerce Technical Advisory Board, *The Automobile and*

Obviously, all these issues call for essentially legislative, not judicial, choices.

Thirdly, given the constantly shrinking number of uncontrolled used vehicles on the road and the increasing stringency of the standards applicable to new models, it is obvious that plaintiffs' proposed retrofit remedy, in addition to its other defects, can be of little practical significance in reducing overall levels of air pollution. By the time this Court or any court could responsibly render a judgment granting the extraordinary retrofit relief plaintiffs seek, and by the time a retrofit program (with the necessary inspection and maintenance that would have to accompany it[40]) could be established, the overwhelming proportion of the used cars on the road would be the federally-controlled vehicles of the 1968 and subsequent model years.[41] At that point in time, the need or effectiveness of any judicial retrofit relief whatever would be, at best, open to serious question,

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Air Pollution: A Program for Progress, Pt. 1, at 36 (Dept. of Commerce Print, 1967); Ruff, *The Economic Common Sense of Pollution,* 19 The Public Interest 69 (1970); Posner, *Antitrust Policy and the Consumer Movement,* 15 Antitrust Bull. 361 (1970).

[40] See California Air Resources Board, A Report to the Legislature on Vehicle Emission Inspection (July 1, 1971), excerpts from which are reprinted in Item 6 of the Separate Appendix.

[41] The Automobile Manufacturers Association estimates that by July 1975, 77 million of the 100 million passenger cars then on the road will be 1968 or later models. (In 1970, 78% of the vehicles on the road were less than eight years old. See Automobile Manufacturers Association, 1971 Automobile Facts and Figures, at 22.)

even assuming the States had not acted on their own in the interim.[42]

Finally, even if retrofit were ultimately found after trial to be an appropriate and useful federal judicial remedy in this case, both the trial and the remedy, as we show in the next section of this Memorandum, could be more efficiently provided in the cases plaintiffs have filed against defendants in the federal district courts, with such appellate review as this Court deems appropriate when and if the occasion should arise. There is nothing so simple or magical in the proposed retrofit remedy, or in the imagined power of this Court to provide that remedy more quickly, that would justify trying one of the most complicated fact cases in modern times before a court so admittedly "ill-equipped for the task of fact-finding" and so heavily burdened with other responsibilities. *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. at 498.[43]

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[42] The States' implementation plans for attaining the national ambient air standards within their boundaries by 1975 are to be submitted to the Environmental Protection Agency by January 30, 1972. EPA, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended, at 4-4 (July 9, 1971). These plans are "expected to include a variety of abatement strategies and contribute greatly to our understanding of the significance of motor vehicle emissions control." *Id.*

[43] Defendants feel constrained to comment on the grossly misleading assertion by *amici* that used cars now on the road can be retrofitted with exhaust controls which are "precisely" the same ones that "the manufacturers conspired to block" and that California would have ordered installed on 1966 models, "had not the auto manufacturers blocked this advance by hurriedly proposing engine modifications." *Amici*

III. Plaintiffs' complaints in the district courts, and the proceedings currently in progress under the direction of Multidistrict Litigation Panel, demonstrate that there is no necessity for this Court to exercise original jurisdiction over plaintiffs' proposed complaint herein.

All of the eighteen plaintiffs in the instant case have now filed actions identical or substantially sim-

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Br. 24-25. The true facts, as contained in official reports, are quite different.

Four exhaust control devices, produced by manufacturers other than defendants here, were certified by the California Motor Vehicle Pollution Control Board in 1964; but three of the devices were approved only for installation on *new* 1966 model cars, not for retrofit on used cars. Calif. Motor Vehicle Pollution Control Board, Resolutions 64-12, 64-13, 64-14 and 64-15 (June 17, 1964). (The one device certified for installation on used cars as well could not be produced by its manufacturer for sale at a price within the $65 limit set by California law. See Transcript, Assembly [of the State of California] Committee on Transportation and Commerce, March 8, 1966: Hearing on Air Pollution Control, at 4; Calif. Motor Vehicle Pollution Control Board, Summary of Report on Exhaust Control Devices of American Machine & Foundry Company—Chromalloy Corporation, June 10, 1964, at 3-4.) The defendants made their proposals for exhaust emission control (which were made possible by the cooperative industry effort here under attack) *in order to meet* the new California emissions standards for 1966 cars that became operative upon the certification of these four devices, *not* to block implementation of the standards. Defendants' various proposals for their 1966 model cars were approved by the Control Board, with an exemption for that small part of their 1966 model production that they could not engineer into conformity. California Motor Vehicle Pollution Control Board, Resolution 64-36 (November 18, 1964); California Motor Vehicle Pollution Control Board, Resolution 65-2 (January 20, 1965); California Motor Vehicle Pollution Control Board, Resolutions 65-17, 65-18, 65-19, 65-20 and 65-21 (July 14, 1965).

The Board in fact congratulated General Motors, Ford, Chrysler, and American Motors on their "significant contribution" and urged them to continue their "outstanding developmental efforts." California Motor Vehicle Pollution Con-

ilar to this one in various federal district courts.[44] Plaintiffs allege in their complaints below that the federal district courts have jurisdiction to try all of the counts in all of their cases, and to grant all the relief—including the "retrofit" relief—they seek from this Court. Neither in their communications to this Court, nor elsewhere, have plaintiffs disavowed

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trol Board, Resolutions 64-18, 64-19, 64-20, and 64-21 (August 12, 1964). By contrast, the Board later effectively decertified the four devices of the other manufacturers because they required regular maintenance, and the State legislature, in response to public protest, had refused to give the Board authority to impose on vehicle owners the compulsory maintenance requirements upon which the certification of the devices was predicated. California Motor Vehicle Pollution Control Board, Resolution 65-26 (September 15, 1965). See also IV [California] Motor Vehicle Pollution Control Board Bulletin 1, 2 (September 1965).

Excerpts from the items cited above are reprinted as Item 7 of the Separate Appendix.

[44] The district court proceedings initiated by the eighteen plaintiffs herein are listed in Appendix A of this Memorandum. (The total of eighteen includes two States whose pending motions for leave to join in the complaint as parties plaintiff have not yet been acted on by the Court.) All of these district court complaints contain one or more federal antitrust counts containing the same allegations as the complaints sought to be filed herein, and all of them pray for damages as well as injunctive relief. Two of the complaints, brought by eight of the plaintiffs here plus one State not a plaintiff in this Court (Nevada), also contain counts identical with the second and third counts of the instant complaint. *Washington* v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.); *Kansas* v. *General Motors Corp.*, Civil No. T-4896 (D. Kan.). As previously noted, *supra*, pp. 7-8, these complaints allege that the district courts have federal question jurisdiction over the second count and pendent jurisdiction over the third count.

these allegations.[45] The filing of these district court complaints, and the resulting proceedings currently in progress under the direction of the Multidistrict Litigation Panel, provide conclusive proof (not present in *Wyandotte*) that there is no need to impose the responsibility for conducting the trial of this complex litigation upon the tightly-rationed time of the Supreme Court.

Faced with the reality of these ongoing proceedings below, *amici* seek refuge in the argument that this Court must nevertheless assume original jurisdiction over plaintiffs' claims in order to enable plaintiffs to proceed jointly in a single action and thereby avoid "the necessity of time-consuming and duplicative litigation in numerous district courts and courts of appeal." *Amici* Br. at 9. But the decision whether to file separately or jointly, in several districts or in one district, was wholly within plaintiffs' control. While eleven plaintiff States filed separately in district courts located in their own States, seven plaintiff States as widely separated as Hawaii and Maine joined with one *amicus* State (Nevada) in filing a single complaint in the Central District of California. In defendants' view, there are many practical reasons why a single consolidated trial of the claims of all the plaintiff States is not feasible in this or any other court. But if plaintiffs genuinely held the contrary view, they obviously were free to

[45] By letter dated April 7, 1971, addressed to the Clerk of the Court, defendants informed the Court of these filings. Plaintiffs responded by telegram dated April 15, 1971, with the assertion that the district court actions had been filed merely as a "standby" to avoid the possible effect of the statute of limitations upon district court claims should this Court deny the motion for leave to file.

seek a single trial by filing a joint complaint in one of the district courts. They cannot contend that an original action in this Court was the only way to pursue that objective.

On the other hand, if it is consolidated pretrial proceedings that plaintiffs seek, again they need not come here for relief. Plaintiff States—and *amici* States as well—are parties to the consolidated pretrial proceedings presently taking place in the Central District of California, which also include complaints filed by other governmental bodies and private citizens.[46] Nevertheless, in a further effort to avoid the obvious fact that those consolidated proceedings contradict the asserted need to proceed in an original action in this Court, *amici* complain, albeit in a rather tentative way, about the rate of progress below. *Amici* Br. at 26-30. They urge that this Court should attempt to expedite the litigation by assuming original jurisdiction over plaintiffs' complaint, in which event *amici* "will seek leave to join as plaintiffs here." *Amici* Br. at 1.

Amici do not explain, however, what they would do with their pending district court cases and the damage claims those cases contain, nor do they suggest what would happen to the district court cases filed by the ten other plaintiffs who are not *amici* here and who, since they are not States, cannot file

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[46] The district court actions that have been filed by fourteen of the seventeen *amici* and a number of other parties, arising out of the same subject matter as the original action sought to be commenced here, are listed in Appendix B. All cases, including the district court cases recently filed by plaintiffs herein, have been transferred to the Central District of California for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

original actions in this Court.[47] In any event, without repeating the previous discussion of the difficulties which this Court would have in superseding the trial of some but not all of the previously filed complaints in the district courts, several points need to be made about the allegedly slow pace of the actions below.

Amici appear to be chiefly disturbed by the fact that the District Court has certified for interlocutory review, and the Court of Appeals for the Ninth Circuit has accepted, appeals from the District Court's orders denying defendants' motions to dismiss which were filed in all but two of the consolidated actions and rejecting, in part, defendants' challenges to certain of the class actions and *parens patriae* claims.[48] All briefs in those appeals have been filed, defendants did not object to plaintiffs' request that oral argument be expedited, and the Court of Appeals has scheduled that argument for January 13, 1972.

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[47] Similarly, *amici* do not attempt to show any basis for this Court's original jurisdiction over an action by the one of their number which is not a State, namely, City of New York.

[48] In the District Court proceedings defendants moved to dismiss, primarily on the ground that plaintiffs had no relationship, direct or indirect, to the line of commerce allegedly restrained. See *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). In addition, defendants challenged the authority of the governmental unit plaintiffs to sue *parens patriae* and challenged the propriety of the class actions, which had been filed on behalf of classes as broad as every resident of the United States. The District Court denied the motion to dismiss, and granted in part and denied in part defendants' objections to the *parens patriae* claims and the class actions. The District Court thereafter certified these issues to the Court of Appeals as appropriate for interlocutory review under 28 U.S.C. § 1292(b).

More importantly, no stay of discovery or other pretrial proceedings has been sought by defendants pending this interlocutory appeal. By agreement, the mass of documents compiled by the government in connection with its earlier investigation of the defendants' cooperative research and development program was made available to plaintiffs, and it has evidently taken plaintiffs considerable time to examine, classify and analyze these papers. Beyond this, however, it has been *defendants* who initiated pretrial evidentiary proceedings by seeking and obtaining, without plaintiffs' support, a district court order dated September 8, 1971, commencing a deposition program—now under way—to take the testimony of certain retired employees. It ill behooves *amici*, who are plaintiffs below, to charge defendants with attempting to delay the lower court proceedings.[49]

Finally, defendants are puzzled by *amici's* evident concern that the congressional emission control program, together with the manufacturers' efforts to meet the stringent legislative goals, may solve the entire vehicle emissions problem before the massive litigation launched by plaintiffs and others can be brought to a definitive conclusion. If this is so, it merely bears witness to the superiority of legislative and administrative action to resolve the problem of vehicle pollution, as compared to the type of judicial relief sought by plaintiffs. It affords no reason for

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[49] Cf. Transcript of Proceedings, November 22, 1971, at 49, *In Re Multidistrict Vehicle Air Pollution*, M.D.L. Docket No. 31 (C.D. Cal.) (remarks of Judge Manuel L. Real): ". . . the delays in this [initial] deposition [of a retired General Motors employee] have been the delays of the plaintiff and not the defendant."

this Court to seek to compete either in speed or in substance with the legislative and administrative processes, or for this Court to take over, so far as plainly judicial responsibilities are concerned, the duties currently being discharged in this and related litigation by the federal trial and intermediate appellate courts.

The Chief Justice, in a recent review of the Court's work, reiterated the concern expressed in *Wyandotte* over the need to safeguard the Supreme Court's "paramount role as the supreme federal appellate court" (401 U.S. at 505):

> "[W]e cannot keep up with the volume of work and maintain a quality historically expected from the Supreme Court . . . .
>
> "Either the quantity or quality of the work of the Court must soon yield to the realities." [50]

Plaintiff States are presently pursuing their claims in other forums better suited than this Court to sort out the factual and legal complexities of the cases they plead, and with as much power as this Court to grant the relief they seek. Yet in disregard of this Court's other manifold responsibilities, they ask it to assume the heavy burden of a proceeding duplicative of the district court proceedings and, in its basic thrust, either duplicative of or potentially in conflict with legislative and administrative efforts at the federal and state levels to resolve the same problems.

Over the next several years, this Court may well find it necessary to function as the appellate court

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[50] Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A.J. 855 (1971).

of last resort to review some of the more important legislative, administrative and judicial decisions that will emerge from these ongoing activities. This task alone may require a substantial commitment of the Court's resources. No justification has been shown for asking the Court to assume the added burden of acting as the trial court of first resort for this one set of exceedingly complex and time-consuming cases.

CONCLUSION

Accordingly, leave to file the complaint herein should be denied.

Respectfully submitted,

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APPENDIX A

Plaintiffs

Arizona v. *Automobile Mfrs. Ass'n*, Civil No. 71-174 PHX-WPC (D. Ariz.).

Illinois v. *Automobile Mfrs. Ass'n*, Civil No. 69 C 2194 (N.D. Ill.).

Iowa v. *Automobile Mfrs. Ass'n*, Civil No. 10-231-C-2 (S.D. Iowa).

Kansas v. *General Motors Corp.*, Civil No. T-4896 (D. Kan.).

Massachusetts v. *Automobile Mfrs. Ass'n*, Civil No. 71-622-M (D. Mass.).

Minnesota v. *Automobile Mfrs. Ass'n*, Civil No. 3-70-205 (D. Minn.).

Missouri v. *Automobile Mfrs. Ass'n*, Civil No. 19192-2 (W.D. Mo.).

Ohio v. *Automobile Mfrs. Ass'n*, Civil No. 71-51 (S.D. Ohio).

Rhode Island v. *Automobile Mfrs. Ass'n*, Civil No. 4552 (D. R.I.).

Vermont v. *Automobile Mfrs. Ass'n*, Civil No. 6232 (D. Vt.).

Virginia v. *Automobile Mfrs. Ass'n*, Civil No. 190-71-R (E.D. Va.).

Wahington, et al. (Wash., Colo., Hawaii, Idaho, Maine, W. Va., N.D.) v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.).

APPENDIX B

Amici

Alabama v. *Automobile Mfrs. Ass'n*, Civil No. 3285-N (M.D. Ala.).

California v. *Automobile Mfrs. Ass'n*, Civil No. 70-541-R (C.D. Cal.).

Florida v. *Automobile Mfrs. Ass'n*, Civil No. 1698 (N.D. Fla.).

Louisiana v. *Automobile Mfrs. Ass'n*, Civil No. 71-645 (E.D. La.).

Mississippi v. *Automobile Mfrs. Ass'n*, Civil No. 4849 (S.D. Miss.).

Washington, et al. (Nevada) v. *General Motors Corp.*, Civil No. 71-611-R (C.D. Cal.).

New Mexico v. *American Motors Corp.*, Civil No. 69-C-2040 (N.D. Ill.)

New York v. *Automobile Mfrs. Ass'n*, Civil No. 69-Civ. 5037 (S.D. N.Y.).

Oklahoma v. *American Motors Corp.*, Civil No. 71-155 (W.D. Okla.).

Pennsylvania v. *Automobile Mfrs. Ass'n*, Civil No. 71-610 (E.D. Pa.).

South Dakota v. *General Motors Corp.*, Civil No. 71-14W (D. S.D.).

Texas v. *Automobile Mfrs. Ass'n*, Civil No. CA-3-4584-D (N.D. Tex.).

Wisconsin v. *General Motors Corp.*, Civil No. 70-C 70 (W.D. Wis.).

City of New York v. *Automobile Mfrs. Ass'n*, Civil No. 70-1535 (S.D. N.Y.).

Others

AMF, Inc. v. *General Motors Corp.*, Civil No. 70-4665 (S.D. N.Y.).

Connecticut v. *American Motors Corp.*, Civil No. 70C-417 (N.D. Ill.).

City of Denver v. *American Motors Corp.*, Civil No. 70C-418 (N.D. Ill.).

Grossman v. *Automobile Mfrs. Ass'n*, Civil No. 69-1855-R (C.D. Cal.).

Handy v. *General Motors, Inc.*, Civil No. 69-1548-R (C.D. Cal.).

Keane v. *General Motors Corp.*, Civil No. 69-C 1900 (N.D. Ill.).

Kentucky v. *Automobile Mfrs. Ass'n*, Civil No. 375 (E.D. Ky.).

County of Lackawanna v. *Automobile Mfr.'s Ass'n*, Civil No. 70-398 (E.D. Pa.).

Morgan v. *Automobile Mfrs. Ass'n*, Civil No. 70-366 (E.D. Pa.).

New Jersey v. *American Motors Corp.*, Civil No. 69C-2041 (N.D. Ill.).

City of Philadelphia v. *Automobile Mfrs. Ass'n*, Civil No. 70-345 (E.D. Pa.).

Puerto Rico v. *Automobile Mfrs. Ass'n*, Civil No. 190-71 (D. P.R.).

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Sturtz v. *General Motors Corp.*, Civil No. 69-1892-R (C.D. Cal.).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

STATE OF WASHINGTON, ET AL.,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

SEPARATE APPENDIX TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

(Names and addresses of attorneys on inside cover.)

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

		Page
Item 1	Overview of the Vehicle Emissions Problem	1
	A. Summary and Conclusions from EPA Annual Report on Vehicle Emissions	1
	B. Relationship of Emissions Control to Air Quality Standards: EPA Annual Report	6
Item 2	Technical Factors Involved in Control of Vehicle Emissions	11
Item 3	The California Experience in Retrofitting Crankcase Emission Controls	21
	A. 1963 California Statute Requiring Retrofit of Crankcase Emissions Controls	21
	B. 1964 California Legislative Hearing on Results of Retrofitting Crankcase Emissions Controls	22
	C. 1965 California Legislative Report on Results of Retrofitting Crankcase Emissions Controls	24
	D. 1965 California Statute Suspending Crankcase Retrofit Requirement	26
	E. 1965 California Statute Limiting Scope of Crankcase Retrofit Requirement	28
Item 4	Early History of Vehicle Emissions Control in California	29
	A. 1953 Legislative Report Discussing Discovery of Role of Hydrocarbons in Air Pollution	29
	B. 1958 Report to Legislature on Progress in Developing Vehicle Emissions Controls	31
	C. 1959 Legislative Report on Status of Vehicle Emission Control	33
Item 5	Social, Political, and Economic Factors in Air Pollution	40

Page

Item 6 Varying Legislative Approaches to Inspection and Maintenance of Used Vehicles 45

A. 1971 California Air Resources Board Report on Reducing Emissions by Inspection 45

B. 1971 California Law Authorizing Retrofit Requirement to Reduce Oxides of Nitrogen .. 51

C. 1971 Chicago Ordinance Requiring Inspection to Reduce Hydrocarbon and Carbon Monoxide Emissions 54

D. Proposed New Jersey Law Requiring Inspection to Reduce Hydrocarbon and Carbon Monoxide Emissions 57

Item 7 California Experience with Exhaust Control Devices, 1964-1965 67

A. Approval of Three Exhaust Devices for Factory Installation on New 1966 Model Vehicles 67

B. Approval of One Exhaust Device for 1962 and Subsequent Model Vehicles 69

C. Staff Report on Device Approved for 1962 and Subsequent Model Vehicles 70

D. Report to Legislature on Costs of Exhaust Devices for Used Cars 72

E. Commendation of General Motors, Ford, Chrysler and American Motors for Contributions to California Emissions Control Program 75

F. Approval of Chrysler Exhaust Emission Control System for New 1966 and Subsequent Model Vehicles 76

G. Approvals of General Motors, Ford, American Motors, International Harvester and Kaiser-Jeep Systems for New 1966 and Subsequent Model Vehicles 77

H. Exemption of Two Percent of 1966 Model Vehicles from Exhaust Control Requirements 80

I. Effective Decertification of Exhaust Controls Not Developed by Vehicle Manufacturers 81

ITEM 1—Overview of the Vehicle Emissions Problem

A. *Summary and Conclusions from EPA Annual Report on Vehicle Emissions**

The Clean Air Act as amended charges the Administrator of the Environmental Protection Agency with major responsibilities for the control of motor vehicle emissions. These duties include: establishing emission standards for pollutants which endanger public health and welfare; administrating a number of related activities concerned with vehicle testing, certification and enforcement; regulating the content of fuels; demonstrating the feasibility of low-emission vehicles; monitoring the development of improved devices to control emissions from internal combustion engines; and directing research and development activities related to alternative power systems.

In addition Sections 202(b)(1)(A) and 202(b)(1)(B) require that:

(1) 1975 automobiles achieve a 90% reduction in the emissions of hydrocarbons (HC) and carbon monoxide (CO) which were allowable in 1970, and

(2) 1976 automobiles achieve a 90% reduction in the emissions of oxides of nitrogen (NO_x) from the average levels measured on 1971 automobiles which were not subjected to any federal or state NO_x emission standards.

* * * *

Since the establishment of the Environmental Protection Agency on December 2, 1970, EPA has completed a number of actions related to the control of

---

* Environmental Protection Agency, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, the Clean Air Act As Amended (July 9, 1971), at 1-1 to 1-10.

emissions from motor vehicles. An initial contract has been signed with the National Academy of Sciences to identify the resources necessary to study the technological feasibility of attaining the 1975 and 1976 standards.

EPA has published an advance notice of proposed rule-making indicating its intention to control or prohibit the use of alkyl lead in motor vehicle gasoline.

* * * *

In February, the Administrator sent a letter to all domestic and foreign auto manufacturers requesting information about research and testing activities related to the development of emission control systems designed to meet the 1975 and 1976 standards. EPA also conducted two days of public hearings on this subject during May of 1971.

* * * *

EPA has published certification test results for 1971 model vehicles and engines. National ambient air quality standards have been promulgated which include motor vehicle related pollutants. Regulations have been proposed defining the useful life of vehicles and requiring the inclusion in owners' manuals of maintenance instructions for emission control systems. Specific numerical standards and test procedures have been established for 1975 and 1976 emissions of HC, CO and NO_x.

Demonstration programs relating to low-emission vehicles have been initiated.

* * * *

The Low-Emission Vehicle Certification Board prescribed by Section 212 of the Act has been established.

* * * *

EPA is also directing a research and development program for low-emission vehicular power systems other than the internal combustion engine.

* * * *

Chapter 4 deals with the health and welfare effects of motor vehicle related pollutants. While vehicular emissions are important sources of pollution, especially in congested urban areas, they are not the only sources of these contaminants. In discussing health and welfare impacts it is important to note that it is ambient air quality, the composition of a local air mass, rather than emission levels from particular sources, which is the significant factor although the two are clearly related.

It is difficult to generalize about the relative importance of various contributions of the same air contaminants to ambient air quality because most air masses undergo lateral movements. Thus relative impacts must be looked at in terms of specific localities reflecting differences in geography, meteorological conditions, traffic patterns and the size and locations of all sources of the same pollutants.

A detailed discussion of the progress reported by industry is contained in Chapter 5. This material describes a number of control devices under development and outlines some of the technical problems facing the industry. This material also reiterates a number of concerns expressed by the manufacturers in their communications with EPA.

The final section of this report, Chapter 6, deals with the costs associated with motor vehicle emission control.

* * * *

Neither the final control system needed to achieve the 1975 standards nor the technology for attaining the 1976 standards, have yet been identified. Thus, the cost figures contained in Chapter 6 must be considered preliminary and include informal industry estimates of initial costs ranging from $80 to $600 per car for 1975. However, it appears clear that the costs associated with 1975 and 1976 standards will be considerably greater than those experienced in reaching Federal emission standards through 1974.

Information provided to EPA by auto manufacturers revealed a significant increase in emission control systems research and development activity since the passage of the 1970 amendments to the Clean Air Act. During the first six months of accelerated development, industry laboratories have reported the attainment of reduced emission levels. While there are many problems to be overcome to convert laboratory results into reduced emission levels from mass-produced autos, the added industry effort should improve prospects for significant technological improvements.

* * * *

During the recent public hearings industry spokesmen expressed major reservations about the technological feasibility of achieving the statutory emission standards within the time limits prescribed by law. The manufacturers were unanimous in asserting that the levels of reduction required for 1975/76 precluded the substitution of alternative power systems, making it essential that emission control be achieved through an improved internal combustion engine. Industry representatives consistently stated that reaching the 1976 NO_x emission levels goes beyond the limits of current knowledge and will require some major tech-

nological breakthrough early enough to permit mass production of 1976 models. They also expressed concern about the high cost of attaining the low levels of emissions required by the statute.

At these same hearings representatives of public interest organizations were skeptical of industry statements about their inability to develop the necessary technology to reduce emissions to the required levels. These witnesses pointed to previous instances of resistance by the industrial community to deadlines which were ultimately achieved. Suspicion was also voiced about the vigor of government enforcement concerning interim standards and test procedures. This climate of mistrust makes it important that, to the degree possible, matters related to motor vehicle emission control be given full public exposure.

Motor vehicle emissions are important sources of HC, CO, and NO_x pollutants especially in congested urban areas. However, they are not the only sources of these contaminants. The specific contribution of vehicle emissions to the degradation of ambient air quality is a complex matter and varies from place to place. These variations are attributable to differences in geography, meteorological conditions, traffic patterns, and the size and location of other sources of these pollutants. More information on these matters is expected with the completion of State implementation plans required under the legislation. These plans are also expected to include a variety of alternative abatement strategies. With additional information about the costs and effectiveness of emission control from all types of sources, it should be possible to undertake detailed cost-effectiveness analyses in order to insure that the ambient air quality standards are achieved at the most reasonable cost to the American people.

One of the unfortunate aspects of motor vehicle emission control is that reducing levels of hydrocarbons and carbon monoxide, which is done primarily through increasing the efficiency of combustion, tends to make more difficult the control of oxides of nitrogen, whose formation is largely a function of the heat of combustion. Thus, a major technological challenge faces the Nation's auto industry in meeting these emission standards.

EPA is moderately optimistic that the 1975 standards can be attained especially since it is expected that unleaded gasoline will be generally available at that time. We are also hopeful that technological developments will enable the manufacturers to reach the 1976 standards. However, the costs associated with achieving these standards may be high. Therefore, the Agency is not recommending any legislative changes at this time, although they may be needed in the future.

B. *Relationship of Emissions Control to Air Quality Standards: EPA Annual Report**

As indicated in Chapter 4, the control of auto emissions is an important element in achieving the ambient air standards for HC, CO, NO_x, and photochemical oxidants. However, the relationships between automobile emissions control and the achievement of national ambient air quality standards is extremely complex. For example:

---

* Environmental Protection Agency, Annual Report to the Congress of the United States in Compliance with Section 202(b)(4), Public Law 90-148, The Clean Air Act As Amended (July 9, 1971), at 6-6 to 6-10.

a) Motor vehicles are not the only important sources of HC, CO, and NO_x. . . .

b) The significance of auto emissions upon ambient air quality varies from place to place, and therefore so does the effectiveness of auto emission controls compared to controls over other sources.

c) The cost of HC, CO, and NO_x control for motor vehicles are interrelated since some types of HC and CO control make it more difficult to reduce emissions of NO_x.

d) Meeting the 1975/76 standards will have a cumulative impact over time on air quality as new controlled vehicles replace older models in the automobile fleet. This can be seen on Figures 3, 4, and 5 [included: see pp. 8-10, *infra*], which depict EPA estimates of future national levels of NO_x, HC and CO emissions from gasoline-fueled motor vehicles assuming all future Federal standards are achieved. The graphs do not reflect the possible impact of modifying used vehicles to attain emission reductions.

Considerations such as these are particularly important in attempting to find the least cost means of achieving ambient air quality standards, since the impact of achieving various reductions in automobile emissions will influence the costs of reducing pollutants from other sources. Other sources of particular pollutants (e.g., NO_x from power plants) may be so important in some areas that the reduction of automobile emissions will contribute relatively little to meeting ambient standards in that area.

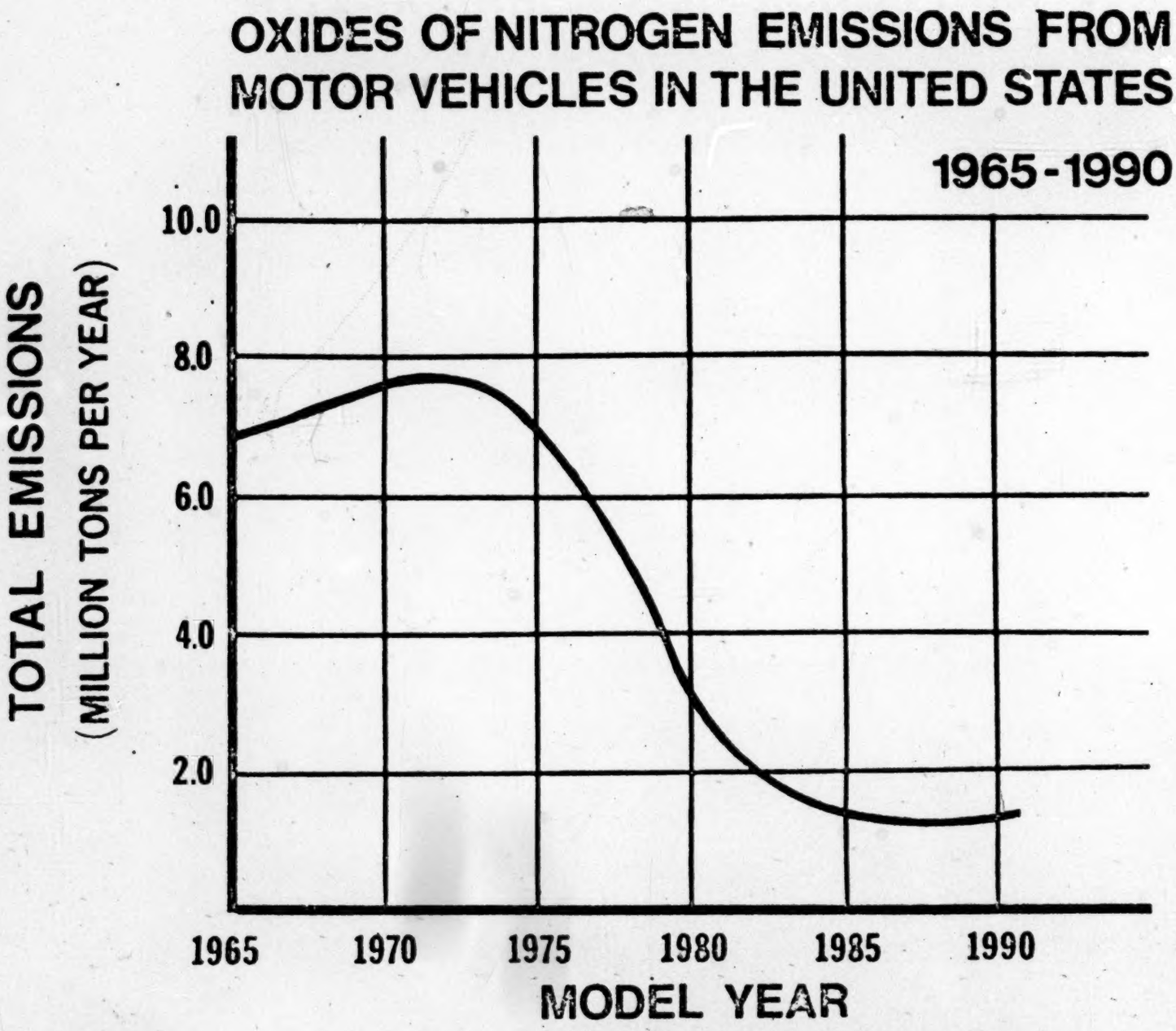

FIGURE 3

PROJECTIONS BASED ON ACHIEVING ALL FEDERAL EMISSION STANDARDS

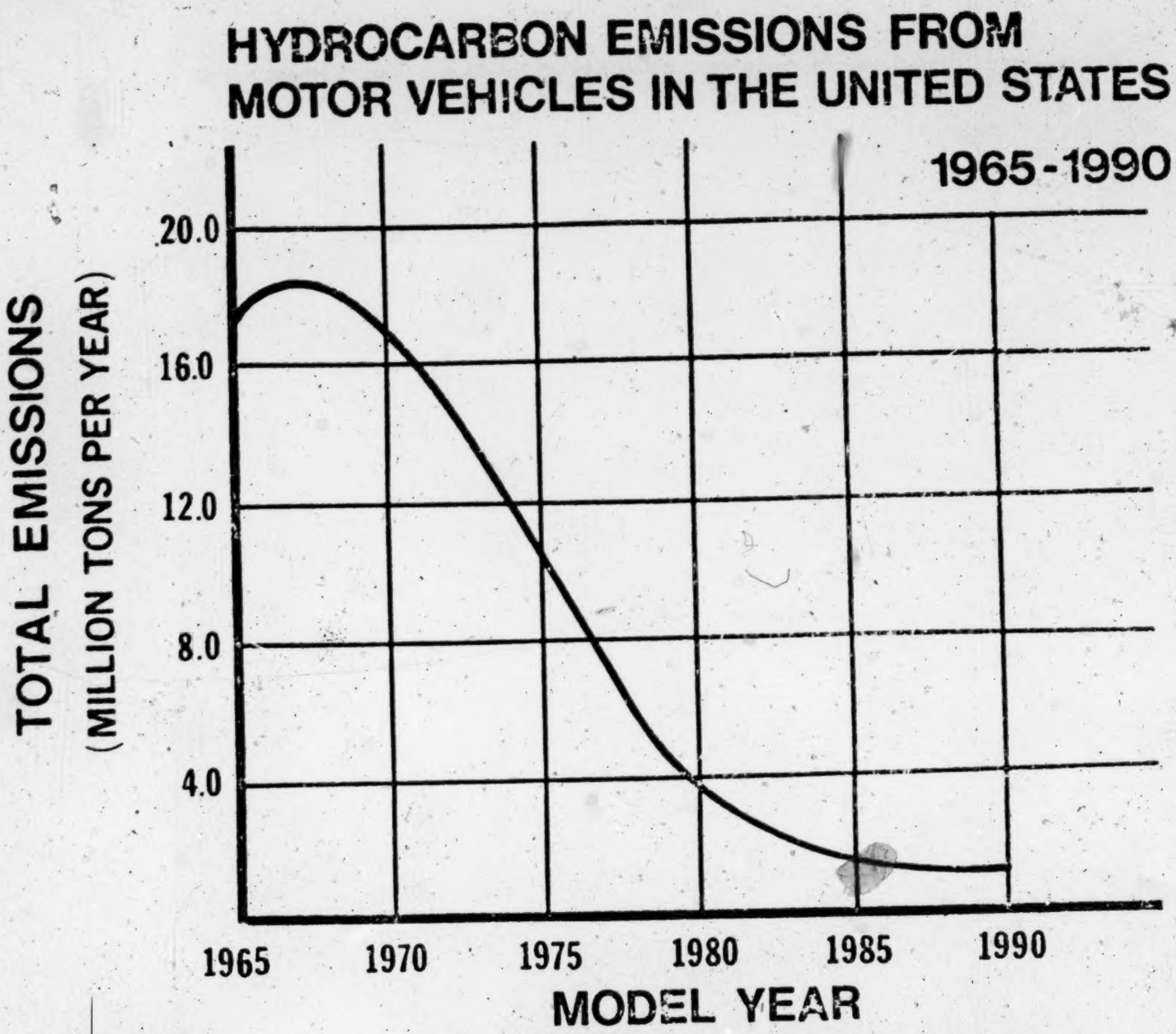

FIGURE 4

PROJECTIONS BASED ON ACHIEVING ALL FEDERAL EMISSION STANDARDS

ITEM 2—Technical Factors Involved in Control of Vehicle Emissions*

The predominant source of carbon monoxide (CO), nitrogen oxide (NO_x), and hydrocarbon (HC) from mobile combustion sources is the exhaust gas from gasoline-fueled engines. An example of the difficulties involved in eliminating exhaust emissions is portrayed in Figure 1-1. [Omitted.] This graph illustrates, for a typical range, that exhaust CO and HC emissions could be reduced by increasing the ratio of air to fuel to the point where more air is present than is required for complete combustion of the fuel to carbon dioxide and water (i.e., an air-fuel ratio greater than the stoichiometric ratio).[**] Maximum emissions of NO_x, however, would occur under such conditions. At very low air-fuel ratios, the NO_x emissions could be reduced, but high concentrations of CO and HC would be produced. At the extremely high air-fuel ratios where all three emissions could, theoretically, be low, operating difficulties such as misfire and stalling would be encountered with most commercially available, gasoline-fueled, internal combustion engines, causing poor performance and high emissions of CO and HC.

Various approaches and devices have been developed, and others are under development for controlling emissions of CO, NO_x, and HC from mobile sources. These encompass various principles of oper-

---

* HEW, Control Techniques for Carbon Monoxide, Nitrogen Oxide, and Hydrocarbon Emissions from Mobile Sources, National Air Pollution Control Administration Publication No. AP-66, at 1-1, 2-11 to 2-15 (1970) (footnotes omitted).

[**] "Stoichiometric ratio" is a term used to define an air-fuel mixture which is theoretically of the correct ratio to obtain complete combustion without excess oxygen.

ation, degrees of effectiveness, complexity, and cost. It is the purpose of this document to present a review of these control methods and to summarize Federal and state emission control programs as they relate to emissions of CO, NO_x, and HC from mobile sources.

* * * *

2.2.3 Emissions

Contaminant emissions from a motor vehicle without emission controls originate from four sources: (1) the carburetor, (2) the fuel tank, (3) the crankcase, and (4) the engine exhaust. Hydrocarbon emission from the first source is the result of fuel vaporization during "hot soak" after shutdown.[*] Vaporization from the tank occurs primarily when the fuel temperature in the tank increases. Crankcase emissions are the result of blowby past the piston rings. These emissions, unless controlled, escape to the atmosphere through the road draft tube or the crankcase ventilation cap. Hydrocarbons and CO appear in the exhaust gas as products of incomplete combustion. Oxides of nitrogen result from the reaction of the nitrogen and oxygen contained in the combustion air at the high temperature prevailing during combustion.

Figure 2-9 [included: see following page] shows the approximate distribution of the emissions from a motor vehicle without any emission control devices.

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[*] "Hot soak" means the transfer of heat from hot components of an engine to cooler components such as the carburetor.

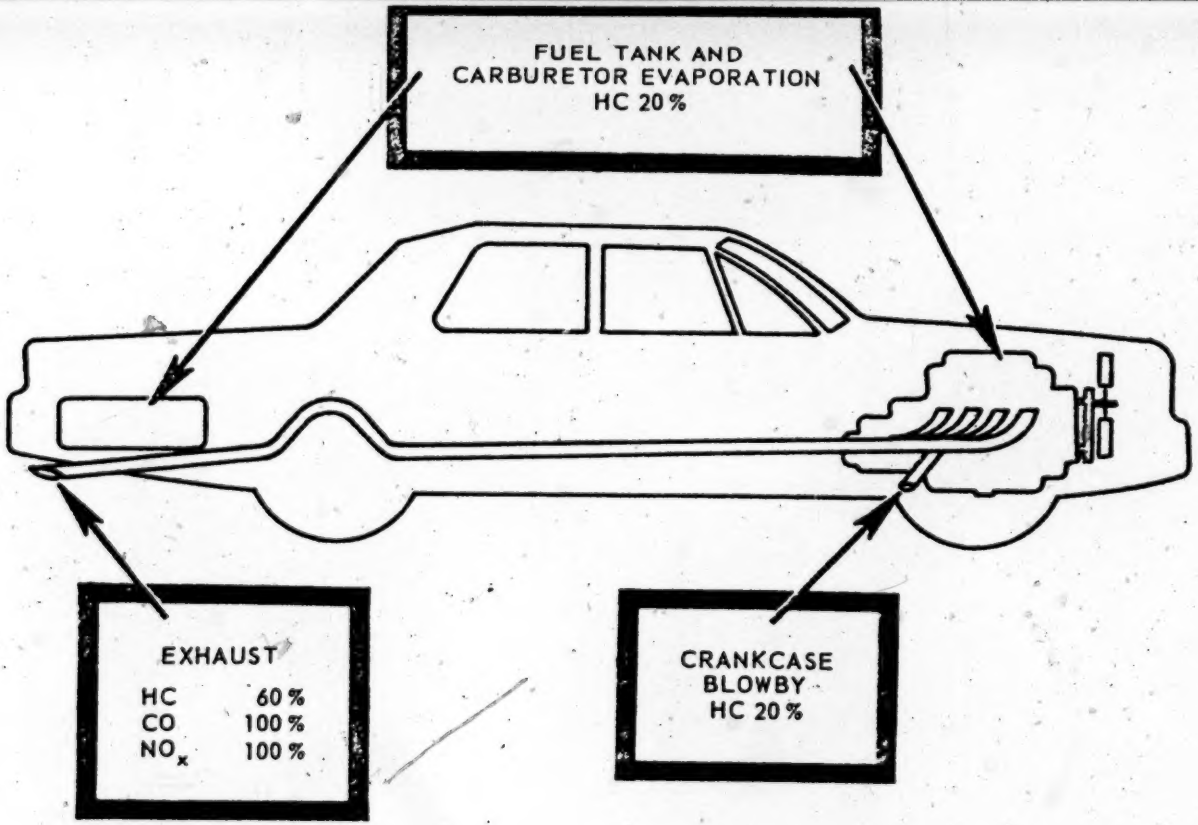

Figure 2-9. Approximate distribution of emissions by source for a vehicle not equipped with any emission control systems.

2.2.3.1 Nature and Formation of Emissions

When a hydrocarbon fuel is burned with the amount of air containing enough oxygen to oxidize it completely, the following basic reaction might be assumed to occur:

$$1.00\ CH_{1.85} + 1.460\ O_2 + 5.50\ N_2 \rightarrow$$
$$0.925\ H_2O + 1.00\ CO_2 + 5.50\ N_2$$

This reaction incorporates the following assumptions:

1. Most hydrocarbon fuels are accurately represented as consisting of 1.85 hydrogen atoms per carbon atom ($CH_{1.85}$).
2. The volume ratio of nitrogen (N_2) to oxygen (O_2) in the air is 3.76:1.
3. The fuel is burned completely to water (H_2O) and carbon dioxide (CO_2).
4. Nitrogen is inert and does not react with any other substances in the combustion chamber.

Assumptions 1. and 2. are quite true in practice. The formation of CO, NO_x, and HC in the combustion process indicates that assumptions 3. and 4. are not wholly correct.

2.2.3.1.1 CO and hydrocarbons. Combustion of the carbon in the fuel proceeds (simplified) through the following steps:

$$2\ C + O_2 \rightarrow 2\ CO$$
$$2\ CO + O_2 \rightarrow 2\ CO_2$$

The first reaction proceeds at a much greater rate than the second. Hydrogen in the fuel is oxidized to H_2O quite easily, provided sufficient oxygen is available locally for combustion. Poor distribution and mixing of fuel and air (which is likely to occur to

some extent when fuel droplets rather than fuel vapor are present) can result in incomplete combustion, and produce CO that is emitted in the exhaust gases. Although the overall air-fuel mixture may be stoichiometric, local conditions at a particular point in a combustion chamber may be far from stoichiometric. Such conditions of poor distribution are also conducive to increased hydrocarbon emissions.

Obviously, a fuel-rich (low air-fuel ratio) mixture introduces more fuel into the combustion chamber than can be completely burned, increasing emissions of CO and hydrocarbons. Also, an air-rich (high air-fuel ratio) mixture would provide excess air to partially offset the increased emissions that result from poor distribution and vaporization. The relatively large amount of excess air used in the diesel and gas turbine engines is the dominent reason for their relatively low emissions of CO and hydrocarbons.

Other factors may also contribute to increased emissions. One of these is the quenching of the flame at the relatively cool combustion chamber boundaries. Quenching can occur even if the fuel is perfectly vaporized and distributed throughout the chamber and is well established as the most significant mechanism leading to exhaust hydrocarbon emissions in properly designed spark-ignition engines.

Gross malfunction of the ignition or fuel induction systems can increase emissions of CO and hydrocarbons from spark-ignition engines. A misfire allows an entire air-fuel charge to be emitted. An automatic choke sticking closed or a very dirty air cleaner element can reduce air-fuel ratio, generally increasing emissions of CO and hydrocarbons.

Chemical equilibrium phenomena should be considered in a discussion of the formation of CO and hydrocarbons. Combustion reactions are somewhat reversible at high temperatures, indicating that products and reactants can exist in equilibrium at high temperatures. This partial reversal of combustion reactions at high temperature is known as dissociation.

If the equilibrium mixture is cooled rapidly (as it is by rapid expansion), it may be "frozen", meaning that its composition is unable to change, even though equilibrium considerations indicate that dissociation should be greatly reduced as the temperature is reduced. The rapid lowering of temperature and the accompanying decrease in the rate at which the mixture approaches the new low-temperature equilibrium, are responsible for the freezing of the composition of the mixture.

2.2.3.1.2 NO_x. Equilibrium considerations are very important in the discussion of the formation of NO_x. The reaction

$$N_2 + O_2 \underset{\leftarrow}{\rightarrow} 2\ NO$$

indicates that nitrogen may be oxidized to nitric oxide (NO) and exist in equilibrium with N_2 and O_2. The concentration of NO which may exist (theoretically) is significant only at high temperatures. This means that N_2 and O_2 do not unite to form a significant concentration of NO at low temperatures. Rapid cooling (as discussed in Section 2.2.3.1.1) can occur, however, and "freeze" the mixture with a relatively high concentration of NO. Generally, the higher the flame temperature to which air is exposed, the higher will be the resulting NO concentration after rapid cooling. The rate of reaction of NO back

to N_2 and O_2 is very low at low temperatures, even though equilibrium considerations favor the reaction.

It is essential to understand the difference between chemical kinetics, which involve the rate at which chemical reactions proceed (which is influenced by temperature), and chemical equilibrium, which involves theoretical concentrations of products and reactants as a function of temperature (and pressure for some reactions), without any consideration of the time which may be required to achieve equilibrium as conditions of temperature (and pressure) change.

From the preceeding discussion, it is apparent that NO_x emissions could be minimized by:

1. Reducing the flame temperature during combustion of air-fuel mixtures.
2. Providing insufficient oxygen to oxidize N_2.
3. Expanding (cooling) the mixture of combustion products at a slow rate which would allow NO to reform N_2 and O_2.

One of the most effective methods for reducing both flame temperature and the amount of oxygen available is to reduce the air-fuel ratio. A fuel-rich mixture burns at a lower temperature than a stoichiometric mixture because heat that could otherwise be used to heat the gases in the combustion chamber must be used to heat excess fuel.

Since oxidation of carbon to CO occurs at a greater rate than oxidation of CO to CO_2, and because combustion of a mole (specific number of molecules) of carbon to CO releases less heat than combustion of a mole of CO to CO_2, burning of a fuel-rich mixture results in a lower heat release than burning of a stoichiometric mixture. The overabundance of fuel

leaves little oxygen available to react with nitrogen. This rich-mixture approach would minimize NO_x emissions at the expense of greatly increased emissions of CO and hydrocarbons unless further measures were taken to control them specifically.

When a high air-fuel ratio charge is burned, much oxygen is available for oxidation of N_2, but the effect of low-flame temperature—resulting from the heating of excess air that does not enter into the combustion reactions—predominates, and reduces NO_x emissions. Presently available spark-ignited, gasoline-fueled engines exhibit poor performance under such conditions, however, probably because of the low velocity of flame propagation through a fuel-lean mixture, resulting in reduction of thermal efficiency. Operation at fuel-lean conditions can damage exhaust valves, and may cause backfiring through the carburetor at very high air-fuel ratios.

Other engine variables influencing the NO_x concentration in spark-ignited engine exhaust gas are:

1. Spark timing—Advancing the spark usually increases the oxides of nitrogen by increasing peak combustion temperature.
2. Engine speed—Increasing speed while advancing the spark and at constant or increasing torque (decreasing manifold vacuum) promotes NO_x formation with either lean or rich mixtures by allowing less time for the products of combustion to expand and approach equilibrium at a lower temperature. Increasing engine speed, however, while maintaining constant power and decreasing torque may tend to decrease NO_x formation by depressing combustion pressure and temperature. The

fact that power is proportional to the product of torque and speed suggests that it may be possible to "optimize" the engine characteristics for the lowest NO_x emissions at a given power level.

3. Compression ratio—Higher compression ratios, which increase peak combustion pressure and temperature, favor formation of NO_x, particularly under lean-mixture conditions.
4. Fuel distribution—NO_x concentration for a particular cylinder depends on the air-fuel ratio in the cylinder. Poor mixture distribution resulting in a near stoichiometric mixture in only a few cylinders of an engine causes a relatively large increase of NO_x for the entire engine.
5. Coolant temperature—Raising the coolant temperature tends to increase NO_x concentration.
6. Combustion chamber deposits—A greater deposit accumulation may increase NO_x concentration.

The high compression ratio of the compression-ignition (diesel) engine results in a high combustion temperature conducive to NO_x emissions. The gas turbine may prove to have the inherent capability for low NO_x emissions. Combustion at fuel-lean conditions in the primary zone, followed by dilution of combustion gases with secondary air at an optimum rate in a long combustion chamber to approach equilibrium at the turbine inlet temperature, may greatly reduce NO_x emissions. The cooling of gases at an optimum rate in a reciprocating-piston, internal-combustion engine is difficult to achieve because engine speed inherently sets the rate of expansion.

ITEM 3—The California Experience in Retrofitting Crankcase Emission Controls

A. *1963 California Statute Requiring Retrofit of Crankcase Emissions Controls**

The people of the State of California do enact as follows:

* * * *

Section 24393 of [the Health and Safety Code] is amended to read:

24393. (a) For the purpose of this section, the 10 months of January 1965 through October 1965 shall be considered as numbered consecutively from 1 through 10.

(b) Each passenger motor vehicle except those specifically exempted, or previously so equipped, shall, during the calendar year 1965, be equipped with a certified device to control emission of pollutants from the crankcase during or prior to the month in which the last digit of its license number corresponds with the number assigned to such month in subdivision (a).

(c) No passenger motor vehicle, except those specifically exempted, shall be registered after December 31, 1965, unless and until it is equipped with a certified device to control emissions of pollutants from the crankcase.

---

* California Statutes, 1963, ch. 999, § 8, at 2264-68.

*3. 1964 California Legislative Hearing on Results of Retrofitting Crankcase Emissions Controls**

CHAIRMAN McMILLAN: Today's hearing of the Assembly Interim Committee on Governmental Efficiency and Economy is on the subject of legislation proposing to register and regulate persons in the business of motor vehicle repair. The two bills are Assembly Bill 2348 by Assemblyman Kennick and Assembly Bill 2638 by Assemblyman Meyers. This controversial matter has been before us for several sessions and has been considered in previous hearings by the Committee on Transportation and Commerce as well as our committee. We hope that a draft of a bill may be proposed at this hearing that will answer the needs of the public and the profession and that we can recommend to the legislature during the 65 session.

Public attention has been called to this problem in recent months due to new legislation providing for the installation of smog control devices on automobiles. Our committee has received numerous complaints from people who have had disastrous experiences. The device or the installation or workmanship has been faulty, resulting in damage to their cars or the cost of the work has been exorbitant. We would like to ascertain whether legislation of the nature proposed here could protect the public in such instances.

We expect to hear arguments for and against the proposed legislation this morning and this afternoon

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* Transcript, Assembly [of the State of California] Interim Committee on Governmental Efficiency and Economy, August 7, 1964: Hearing on Motor Vehicle Repair and Smog Control Devices, at 1, 97.

will go into the specific charges pinpointing the problems in the motor vehicle business.

* * * *

JENNINGS: My name is Lester Jennings.

* * * *

I have a prepared speech that will take about four minutes if that won't take too much time. There has been considerable discussion recently concerning the responsibility for engine damage caused by the presently required Crankcase Smog Control Devices on automobiles.

I would like to state that we are working with a group known as the Citizens for Smog Suppression.

There is apparently little dispute on the fact of damage, as Mr. D. A. Jensen, Executive Officer of the Motor Vehicle Pollution Control Board, has stated his department has received complaints on more than ½ of 1% of the 4 million presently installed devices, or more than 20,000 complaints. He also says, "If they (the automobile industry) have ½ of 1% complaints on any part of an automobile engine, it's a disaster."

It is further inconceivable that *all* who have experienced difficulties of this nature would have complained, or that even a large percentage would have.

The question resolves then to the area of responsibility for the damage with the Motor Vehicle Board claiming this is the fault, in the vast majority of cases, of the mechanics installing these devices. Apparently this accusation stems from the assumption the devices are complicated, delicate, finely machined and need such fine adjustments as to preclude the average mechanic being capable of properly installing same.

C. *1965 California Legislative Report on Results of Retrofitting Crankcase Emissions Controls**

The committee heard testimony on Assembly Bill 2348 by Assemblyman Kennick (1963 Session) and Assembly Bill 2638 by Assemblyman Meyers (1963 Session) in San Francisco on Friday, August 7, 1964. The two bills provide for the registration and regulation of persons in the business of motor vehicle repair. A follow-up hearing on AB 2638 was held in San Francisco on Wednesday afternoon, December 16, 1964.

Public attention had been called to this problem in recent months due to new legislation providing for the installation of smog control devices on automobiles. Many complaints had been received by the committee chairman and the authors of the bills that the devices had been improperly installed, charges were excessive, and motor damage had resulted.

* * * *

FINDINGS

1. Devices installed upon used cars are causing problems which have not developed in new cars which were engineered and designed for the use of a particular device.

2. It was asserted that smog control devices required on old used cars is the first such retroactive or "aftermarket" program and leads to forced obsolescence of cars. Additional motor tune-ups, new engines, etc., sometimes necessitated are an unfair and undue expense for the public. The com-

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* Assembly [of the State of California] Interim Committee Reports 1963-1965, Vol. 8, No. 8, at 31-34 (1965).

plaints, according to the Smog Control Board, are usually due to the incorrect installation of the device. All agreed that crankcase devices on new and old cars have increased mechanical problems and the need for additional upkeep and expense.

3. Charges were made that the devices even on new cars cause the consumption of more oil and gasoline which eventually can cause an increase in atmosphere pollution.

Recommendations

1. Present law concerning inspections should be reconsidered.
2. There should be a publicity program to inform the public of the necessity for servicing devices on cars.
3. A modification of the present law is recommended in cases where installation would be detrimental to the vehicle or the installation charge out of proportion to the value of the car, or the law should be changed to require only new cars to have such devices.

D. *1965 California Statute Suspending Crankcase Retrofit Requirement**

The people of the State of California do enact as follows:

SECTION 1. Section 27156.5 is added to the Vehicle Code, to read:

27156.5. Notwithstanding the provisions of Section 40000, the failure of any person to have a certified motor vehicle pollution control device for the control of emission of pollutants from the crankcase installed upon a used passenger vehicle, as required by Section 24393 of the Health and Safety Code, shall not constitute a crime; and no prosecution of such person for any violation of Section 27156 on account of such failure occurring prior to the effective date of this section shall be commenced or continued.

SEC. 2. Section 24393.4 is added to the Health and Safety Code, to read:

24393.4. Notwithstanding the provisions of Section 24396, the failure of any person to have a certified device for the control of emission of pollutants from the crankcase installed upon a used passenger vehicle, as required by Section 24393, shall not constitute a crime; and no prosecution of such person for any violation of Section 24393 occurring prior to the effective date of this section shall be commenced or continued.

SEC. 3. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV

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* California Statutes, 1965, ch. 3, at 872-73.

of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

Under existing legislation, owners of used passenger vehicles in a number of counties in the state are required, commencing in January of this year, to have motor vehicle pollution control devices for the control of emissions of pollutants from the crankcase installed on their vehicles. This requirement has caused great concern and confusion throughout the state, and the Legislature is currently considering legislation designed to substantially eliminate this requirement and to clarify the law with respect to motor vehicle pollution control. If such legislation is enacted, and it appears probable that it will be, a substantial number of motorists in this state will either have incurred needless expense to have devices installed or will have run the risk, during the period prior to its enactment, of being prosecuted for a misdemeanor. This act provides that the failure of such persons to have the devices installed under the existing schedule of installment is not a crime; and in order to provide immediate protection for these persons it is essential that this act go into immediate effect.

E. *1965 California Statute Limiting Scope of Crankcase Retrofit Requirement**

The people of the State of California do enact as follows:

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Section 24390 is added to [the Health and Safety Code] to read:

24390. (a) Every 1966 or later year model motor vehicle subject to registration in this state shall be equipped with a certified device or devices to control emission of pollutants from the crankcase and exhaust.

(b) On and after December 1, 1965, every motor vehicle of 1963 or later year model subject to registration in this state shall be equipped with a certified device to control the emission of pollutants from the crankcase.

(c) Every motor vehicle of 1955 through 1962 year model subject to registration in this state upon transfer of ownership and registration to an owner whose residence is in a county or portion of a county within an air pollution control district which may function and exercise its powers shall be equipped with a certified device to control the emission of pollutants from the crankcase.

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* California Statutes, 1965, ch. 2031, § 4, at 4609.

ITEM 4—Early History of Vehicle Emissions Control in California

A. *1953 Legislative Report Discussing Discovery of Role of Hydrocarbons in Air Pollution**

It was known, of course, when the air pollution control district was created in 1947, that there was smoke in the air, coming from oil burning, rubbish burning, and the disposal of industrial wastes. This pollution could be seen and was immediately attacked.

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Sulphur dioxide was also known to be present in the air in large quantities, and it was known that it was one of the causes of reduced visibility. Tests showed about 600 tons were emitted into the atmosphere each day, about half of it from the chemical and oil industries, and the other half from oil-burning heat-and-power producing equipment.

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Dusts, fumes, and liquid particles were also known to be in the atmosphere, resulting from the metallurgical industries, from mining, earth processing, clay grinding, and asphalt production, etc. In 1948, approximately 100 tons per day were emitted into the atmosphere.

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None of these visible or known pollutants seemed to be potent enough even at high concentration to produce the eye irritation and crop damage which

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* Report of the Subcommittee of the Assembly [of the State of California] Interim Committee on Governmental Efficiency and Economy, Study and Analysis of the Facts Pertaining to Air Pollution Control in Los Angeles County 12-15 (1953).

was complained of in Los Angeles County. Search was made for other pollutants. Altogether more than 50 chemical compounds or elements were found in the atmosphere. These were given scientific analysis. The most important of these were discovered to be hydrocarbons or gasoline vapors.

It was known that large quantities of gasoline vapors were emitted into the air but gasoline vapor in itself appeared to be harmless. As a result of scientific studies, principally those of Dr. A. J. Haagen-Smit, of the California Institute of Technology, who was employed on a full-time basis by the air pollution control district, it was discovered that the hydrocarbons in gasoline vapor were oxidized by ozone and other substances when in the prescence of sunlight. The concentration of ozone in the atmosphere about Los Angeles is about 10 times that known in any other industrial area. Scientific research has shown that the hydrocarbons under these circumstances give rise to the irritating material which causes eye irritation and crop damage. They also give rise to aerosols or haze and to bad smelling compounds. These results can be produced in the laboratory artificially by the oxidization of hydrocarbons.

More than 2,000 tons of hydrocarbons were emitted into the atmosphere daily in 1948, about 1,100 tons from petroleum refining and tank storage, about 850 tons from motor vehicles, about 115 tons from delivery losses in petroleum marketing and 25 tons by other industries. Within the past six months a reduction of 100 tons per day has been effected by the use of vapor-recovery systems and properly designed storage tanks which prevent the emission of gasoline vapors. The Automobile Manufacturers Association in Detroit is working in close liaison with the district

in endeavoring to develop some process by which the emission from motor vehicles may be reduced.

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This very recent discovery of hydrocarbons in the air pollution picture has created an entirely new problem which was undreamed of at the time the district was created.

B. *1958 Report to Legislature on Progress in Developing Vehicle Emissions Controls**

My name is Smith Griswold. I am the Air Pollution Control Officer of Los Angeles County. It was my feeling, from the letter I received from you assemblymen, that your prime purpose was to discuss the progress made and the situation as it now exists in regard to control devices and I would pretty much like to stay with that and just comment briefly with what has happened since your committee met nearly two years ago, but I would like to go into detail so that there wouldn't be any misunderstanding of a rather complicated problem as to the availability of devices and as to their installation on the nearly six-million cars we have in California.

Since your last meeting, there have been very important breakthroughs in the field of device development. Now, I would like to outline briefly that a device development, a practical development, has to be broken down into several things. Now, four years ago the industry and all of us in this field felt that there were certain types of controls which could go

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* Transcript, Assembly [of the State of California] Interim Committee on Transportation and Commerce, December 1, 1958: Hearing on Automotive Smog Control, at 2-4.

on a car. Some of them were deceleration fuel shutoffs to control the emissions of hydrocarbons at the carburetor, on the intake side. At one time, five years ago, it was felt that that was an easy thing to do and most of our work was done in that field and while we still were working on the control at the exhaust, yet that being a very difficult job, necessarily would take much longer.

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[S]ome two years ago our improved instrumentation showed us that the deceleration cycle, instead of being about forty to fifty percent of the exhaust or of the problem from the automobile, it dropped to where it was around twenty to thirty percent. Now, it became quite obvious that the installation of even a deceleration fuel shutoff device, which is much simpler, much easier to engineer, would require several years, two to three years to install on the three million cars in Los Angeles County.

During those three years, the normal accretion of additional automobiles would be such in this area that by the time the device was installed, the percentage of performance would be offset by the increased number of automobiles, and therefore, there might not be or, in fact, reasonably would not be, an appreciable improvement in the general smog characteristics as we know them in Los Angeles, so the emphasis was shifted, rather drastically, not to the exclusion of the deceleration fuel shutoff, but to bringing along the exhaust-type control device with a consideration of the fuel shutoff as a complementary or supplementary device.

C. *1959 Legislative Report on Status of Vehicle Emission Control**

It is the purpose of this report to review past studies of the smog and noise nuisances produced by motor vehicles in the heavily trafficked metropolitan areas and to obtain information concerning the current status of research programs by industry and governmental agencies designed toward the development of principles and devices with which to combat the spread of noxious gases and annoying noise.

A. Smog Control Devices

1. *Background*

This committee delayed its hearing on the problem of control of that portion of smog which is induced by motor vehicle exhaust fumes until after the automotive industry had completed its symposium on this topic in the late fall of 1958. This was done in order that testimony might be taken and information obtained from which some conclusions could be reached on the progress of research in this field. From this testimony it was hoped that recommendations could be made concerning the type, or types, of devices which could be used as standards for installation on motor vehicles in California to reduce the output of smog-producing hydrocarbons and oxides of nitrogen from automotive exhausts. The conclusion by the Los Angeles Air Pollution Control authorities, based on nearly 10 years of research on the part played by

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* Report of the Assembly [of the State of California] Interim Committee on Transportation and Commerce, Motor Vehicle and Highway Problems 44-49 (Assembly Committee Reports 1957-59, Vol. 3, No. 6 (1959)).

the automobile in the increasing smog problem is the basis for the assumption that they are a major contributing factor.

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As a result of these assumptions concerning the part the automobile has played, and is playing, in the overall production of smog, not only in the Los Angeles area but elsewhere, the automotive industry in 1953 organized a Vehicle Combustion Products Committee under the direction of the Automobile Manufacturer's Association Engineering Advisory Committee, for the purpose of establishing an intensive, co-operative research program to develop methods for the control of the emissions of automotive exhaust gases which contribute to the air pollution problem. This action was undertaken primarily to assist the Los Angeles community to combat the automobile-induced factor of photochemical smog. The industry program has been conducted since that time at a cost of approximately one million dollars a year, as reported by them to an Assembly committee on October 22, 1958.

2. *Problems Encountered*

The problems encountered and which have not yet been completely and satisfactorily resolved by research teams representing both the Los Angeles Air Pollution Control District and the AMA are numerous. As pioneers in the search for intruments with which to accurately measure the effectiveness of principles which have been advanced to control the output of smog-producing gases from automobiles, the Los Angeles APCD believes that they have succeeded in effecting a breakthrough in this particular. As an

example, this improved instrumentation has made it possible for their researchers to eliminate the deceleration cycle of automotive operation as the principal cause of smog production by the automobile. While this discovery was of major importance, it has had the effect of increasing rather than decreasing the overall problem of control. This seeming paradox is, really, rather simply explained. While the problem of engineering a suitable device to control the gasoline intake to the motor so as to eliminate, or greatly reduce the quantity of a "rich" mixture of fuel passing through an idling motor was found to be a simple one, still the problem of installing such a device on the three million cars in Los Angeles County was a major one and would have required from two to three years to effect. Since it was discovered that the deceleration cycle was responsible for less than one-fourth instead of more than one-half of the automotive smog production, this would have been a major blunder.

But the elimination of the deceleration cycle as the major factor in automotive smog production has not reduced the scope of the problem. Instead, the improved instrumentation made it manifest that it would be necessary to control the gaseous output induced by all phases of car operation: that is, idling, cruising and acceleration as well as deceleration.

This meant that any control to be effective, would have to be located in the exhaust system. That is where research, currently, is being concentrated.

3. *Principles and Devices*

Two major principles for the reduction, percentage-wise, of motor vehicle exhaust fumes have been de-

veloped. These are the use of catalytic converters to oxidize the exhaust hydrocarbons and the installation of afterburners to complete the combustion of the fuel which has passed, unburned, from the engine into the exhaust system.

Both these principles represent breakthroughs in the overall problem of reducing the amount of hydrocarbons produced as the result of the emission of unburned fuel from the motor to the surrounding atmosphere. But these developments do not solve the major problem, that of developing a device (or devices), designed in such a manner so as to be effective, economical, and of a size and shape to be symmetrically and readily installed on all types of automobiles.

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4. *Finding of Facts*

a. That research by an agency of the Los Angeles Air Pollution Control District, over a period of about eight years, has convinced that body that between 60 and 66 percent of the eye-irritating, crop damaging, smog is caused by photochemically induced reactions between the hydrocarbons and oxides of nitrogen which are contained in automobile exhaust gases.

b. That the Automobile Manufacturers in 1953 began a co-operative attack, with the Los Angeles APCD on the problem of reducing the emissions of hydrocarbons and oxides of nitrogen from automobiles.

c. That in recent years it has been determined that control of the problem can only be effected by the installation of a suitable device in the exhaust system of automobiles, rather than by controlling the

fuel mixture and quantity during the deceleration and idling cycles of motor operation.

d. That the AMA, in conjunction with the Los Angeles APCD, have developed two main principles of control of automobile-induced smog. These are:

1. The principle of using a catalytic converter to oxidize or dissolve the unburned hydrocarbons. These are of several types, using different catalytic agents, such as:
   a. The Oxy-Catalyst (Houdry-GM) Converter
   b. The Vanadium Pentoxide (Ford) Converter
   c. The Vanadia-Alumina (Ford) Converter
2. The afterburner principle designed to complete the combustion of unburned gases in a furnace-type device in the exhaust system.

e. That at the time of going to print, no device, based upon either of the above principles, has been developed which could be installed on automobiles already in operation.

f. That some of the problems confronting the AMA in the design and construction of a suitable operating device, employing either the catalytic converter or afterburner principle of hydrocarbon control, are:

1. Design, including size, shape, weight, safety, and installation characteristics.
2. Quantity of production. Will there be a market for such a product in areas other than Los Angeles or, in the maximum, all of California?

3. Buyer opposition to cars equipped with smog control devices, regardless of local or state regulations. This opposition is partly an economic one. The first cost of the least expensive device is now estimated to be between $125 and $200 per unit. In all of California this could mean an outlay of $1,125,000,000, at least, using an average cost of $150 per unit for 7,500,000 cars. This is a modest estimate. In addition, such a great outlay should be followed up by an adequate inspection system to insure that the devices are operating in an efficient manner. This could require a statewide inspection system for all motor vehicles with the concomitant problems of what type of inspection operation would be required, and whether state or private ownership (or a combination of both), would finance the project. Also involved would be the number and cost of individual inspections that would be necessary.

g. That there is some evidence to support the contention of the Los Angeles APCD that research in the field of smog control should be augmented and speeded up by assistance from state funds.

h. That even if a suitable device is developed to reduce the air contaminants produced by automobile exhaust fumes, there is still the problem of air pollution stemming from fumes caused by the evaporation of gasoline from automobile carburetors and tanks. The Los Angeles APCD estimates that as much as 84 tons of irritants are produced on the hottest days from this source.

i. That there is also the question of whether or not the automobile-induced air contamination is a local or a statewide problem.

j. That the witnesses representing the Los Angeles APCD were unanimous in their praise of the AMA smog control research team for their active interest in attempting to solve the Los Angeles smog problem and for the spirit of co-operation that exists between the APCD and the AMA research groups.

k. That a contributing factor in the problem of smog control is the rapid growth of the Los Angeles area which amounts to an equivalent of the entire present population of Pittsburgh, Pennsylvania, every three and one-half years. Industries and automobiles are increasing at least proportionately to the population growth.

l. That the California Highway Patrol will be ready to set up testing procedures whenever adequate smog control devices are produced and suitable standards for their operation are adopted. This could well require statewide inspection of all automotive vehicles at stated intervals because of the engineering difficulties which are apparent at this time.

m. Dr. Haagen-Smit, of the California Institute of Technology, in a letter to Chairman Lee Backstrand of the Southern California subcommittee, and which was read into the record, suggested an alternative to attempting the control of automotive-induced smog by the installation of devices on all motor vehicles. This was that it might become necessary to legislate on the olefin content of gasoline to produce a fuel free from smog-producing ingredients.

ITEM 5—Social, Political, and Economic Factors in Air Pollution*

Environmental problems seldom stem from simple causes. Rather they usually rise out of the interplay of many contributing circumstances.

Misplaced Economic Incentives

Many individuals cite selfish profit seekers for environmental degradation, rather than laying much of the blame—where it belongs—to misplaced incentives in the economic system. Progress in environmental problems is impossible without a clearer understanding of how the economic system works in the environment and what alternatives are available to take away the many roadblocks to environmental quality.

Our price system fails to take into account the environmental damage that the polluter inflicts on others. Economists call these damages—which are very real—"external social costs." They reflect the ability of one entity, e.g., a company, to use water or air as a free resource for waste disposal, while others pay the cost in contaminated air or water. If there were a way to make the price structure shoulder these external costs—taxing the firm for the amount of discharge, for instance—then the price for the goods and services produced would reflect these costs. Failing this, goods whose production spawns pollution are greatly underpriced because the purchaser does not pay for pollution abatement that would prevent environmental damage. Not only does this failure encourage pollution but it warps the price struc-

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* Council on Environmental Quality, First Annual Report, *Environmental Quality* 12-16 (1970).

ture. A price structure that took environmental degradation into account would cause a shift in prices, hence a shift in consumer preferences and, to some extent, would discourage buying pollution-producing products.

Another type of misplaced incentive lies imbedded in the tax structure. The property tax, for example, encourages architectural design that leans more to rapid amortization than to quality. It may also encourage poor land use because of the need for communities to favor industrial development and discourage property uses, such as high-density housing, which cost more in public services than they produce in property taxes. Other taxes encourage land speculation and the leapfrog development that has become the trademark of the urban-rural fringe.

Values

Americans have placed a high priority on convenience and consumer goods. In recent times they have learned to value the convenience and comfort of modern housing, transportation, communication, and recreation above clean earth, sky, and water. A majority, like a prodigal son, have been willing to consume vast amounts of resources and energy, failing to understand how their way of life may choke off open space, forests, clean air, and clear water. It is only recently that the public has become conscious of some of the conflicts between convenience and a deteriorating environment.

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Population

Americans are just beginning to measure the magnitude of the impact of population and its distribution

on their environment. The concept that population pressures are a threat to the Nation's well-being and to its environment is difficult to grasp in a country which, during its formative decades, had an ever receding western frontier. That frontier ended at the Pacific many years ago. And it is at the western end of the frontier that some of the most serious problems of population growth emerge most clearly.

California continues to lure large numbers of Americans from all over the country, in large part because of its climate and its beauty. But as the people come, the pressures of population mount. Smog, sprawl, erosion, loss of beaches, the scarring of beautiful areas, and the congestion of endless miles of freeways have caused thoughtful Californians to consider stemming the continued uncontrolled development of their State. When the Governor's Conference on California's Changing Environment met last fall, it agreed that there was now a need "to deemphasize growth as a social goal and, rather, to encourage development within an ideal and quality environment."

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Technology

The major environmental problems of today began with the Industrial Revolution. Belching smoke from factory stacks and the dumping of raw industrial wastes into rivers became the readily identified, but generally ignored hallmarks of "progress" and production. They are no longer ignored, but the extraordinary growth of the American economy continues to outpace the efforts to deal with its unwanted byproducts.

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Mobility

The extraordinary, growing mobility of the American people constitutes another profound threat to the environment—in at least three major ways. The physical movement of people crowds in on metropolitan centers and into recreation areas, parks, and wild areas. Mobility permits people to live long distances from their places of employment, stimulating ever greater urban and suburban sprawl. The machines of this mobility—particularly automobiles and aircraft—themselves generate noise, air pollution, highways, and airports—all in their way affecting the environment.

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Limitations of Government Units

Most government agencies charged with solving environmental problems were not originally designed to deal with the severe tasks they now face. And their focus is often too narrow to cope with the broad environmental problems that cut across many jurisdictions. Agencies dealing with water pollution, for example, typically do not have jurisdiction over the geographic problem area—the watersheds. Control is split instead among sewerage districts, municipalities, and a multitude of other local institutions. To attack water pollution effectively may require establishing new river basin authorities or state-wide basin agencies with the power to construct, operate, and assess for treatment facilities.

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Information Gap

Sometimes people persist in actions which cause environmental damage because they do not know that

they are causing it. Construction of dams, extensive paving of land surfaces, and filling of estuaries for industrial development have in many cases been carried out with incomplete or wrong information about the extent of the impact on the environment. Furthermore, change in the environment has often been slow and exceedingly difficult to detect, even though piecemeal changes may eventually cause irreversible harm. Widespread use of certain types of pesticides, mercury pollution, and the use of dangerous substances such as asbestos occurred without advance recognition of their potential for harm.

ITEM 6—Varying Legislative Approaches to Inspection and Maintenance of Used Vehicles

A. *1971 California Air Resources Board Report on Reducing Emissions by Inspection**

The California motor vehicle emission control program requires the installation of control systems on motor vehicles as a means of reducing hydrocarbons, carbon monoxide and oxides of nitrogen. Success of this program depends on effectiveness of control systems at the time of installation and on their continual effectiveness during the service life of the vehicle. Once properly installed, systems for crankcase and evaporative emission control require relatively little maintenance and adjustment to continue to operate properly. Exhaust controls include the engine carburetion and ignition system and is much more sensitive to adjustment and maintenance.

In emission surveys, it is not unusual to find cars that discharge contaminants several times the average emissions. Many of these cars could be restored to a reasonable level of emission by minor adjustments or replacement of worn out ignition system components. Tests by the Air Resources Board of controlled vehicles have shown that the exhaust emissions often increase because of poorly maintained or maladjusted carburetion and ignition systems. The emissions would be lower if the vehicles are properly maintained and adjusted. Because of the potential benefits for emission reduction, interest has developed in a mandatory vehicle inspection program. As a

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* California Air Resources Board, A Report to the Legislature on Vehicle Emissions Inspection 1-2, 14-23 (July 1, 1971).

result, the 1970 Legislature directed the Air Resources Board to undertake a study to determine:

1. The reductions in automotive emissions that could be achieved by practicable vehicle emission inspection programs; and
2. The costs of carrying out such programs on a permanent basis.

The Board was to report its findings and recommendations to the Legislature by July 1, 1971. Should the Board recommend the initiation of any specific vehicle emissions inspection program, it was also to describe the estimate of the reduction in air pollution that would be achieved, the manner in which the program would operate, and the projected annual cost.

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V. Discussion

1. *General Comments on Northrop and TAC Conclusions*

The study by Northrop and the evaluation by the Board's Technical Advisory Committee have both indicated inspection and mandatory maintenance would be beneficial in terms of hydrocarbon and carbon monoxide reductions, but would increase oxides of nitrogen emissions. There are the common findings that inspection would be costly in terms of total annual costs, would require skilled personnel that are not currently available, and would take a period of several years to develop and implement. The consensus of both studies is also that to be of maximum benefit, the program must be operative within a few years.

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2. *Effects on Emissions*

Among the four possible methods of inspection studied, Northrop concluded that the key-mode test was the most cost-effective. If a statewide inspection system is carried out using this method, exhaust hydrocarbon emissions could be reduced by 200 tons per day statewide averaged over the first five years, or by about 20 percent.

Reducing exhaust hydrocarbons by 20 percent, in effect, produces about a ten percent decrease in total hydrocarbon emissions to the atmosphere. In terms of improvement in photochemical smog, the benefit would even be less because the reduction of hydrocarbon is offset by oxides of nitrogen increases which will be discussed later.

It is questionable that an inspection program could be realistically expected to be fully implemented in 3 to 4 years. By that time, another 30 percent of the older cars would be replaced by new vehicles which will be equipped with exhaust control systems. Since inspection is more effective in reducing hydrocarbon from uncontrolled cars than new vehicles, the benefits of a program will be less if it were not operative until 3-4 years from now.

The expected hydrocarbon reduction, of 20 percent would be similar to the effect of reducing motor vehicle usage by 20 percent, that would be accomplished by a ride-sharing program, or by voluntarily restricting the use of motor vehicles. Reducing motor vehicle use would, of course, be even more beneficial because it would reduce all emissions, not just hydrocarbons and carbon monoxide.

A negative aspect of an inspection and maintenance program for present cars is the adverse effect

on oxides of nitrogen emissions. The increase in these emissions would partially offset the gain in the other emissions. When cars have oxides of nitrogen control systems, inspection would be expected to reduce the emission of these compounds from malfunctioning control systems. However, at that time the expected reduction in hydrocarbon and carbon monoxide will be less because there will be fewer uncontrolled vehicles.

With respect to carbon monoxide, there appears to be significant benefit. Not only are the magnitude and percentage of reduction large by comparison to hydrocarbon emissions, such reduction will also have a noticeable effect on the ambient concentration of carbon monoxide since over 90 percent of carbon monoxide in the air comes from motor vehicles. Carbon monoxide is not the most critical problem in California from the standpoint of public response to air pollution. Incidents of high carbon monoxide concentration will be alleviated through the current control program. Because photochemical air pollution is the most troublesome problem in California, this is the problem the inspection program should be mainly designed to help alleviate.

3. *Cost*

An inspection and maintenance program, regardless to the method used, would be costly.

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4. *Personnel Needs*

Northrop and TAC concluded that sufficient personnel with technical skills required for the inspection program are not now available.

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5. *Other Implications of Inspection Program*

The method most suitable for a statewide inspection program, and the emission benefits to be realized will vary depending on whether the program is intended to controlled vehicles, to uncontrolled vehicles or to both. If it is for both, the distribution of controlled and uncontrolled vehicles in the vehicle population and the type of control systems used are important factors that must be taken into account.

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VI. Summary

1. The study by Northrop and evaluation by the Board's Technical Advisory Committee both indicate that inspection and mandatory maintenance is technically feasible and that it would achieve some reductions of hydrocarbons and carbon monoxide emissions from motor vehicles, but it would increase oxides of nitrogen. The decision to undertake an inspection program, however, should not be based on technical feasibility alone. The expected benefits of the program must be balanced against the adverse effects of oxides of nitrogen increase, costs, inconvenience to the motorists, the requirement of trained and skilled personnel.
2. On a long-term basis, regular inspection and maintenance is needed. All or most of the cars will be equipped with systems that involve engine modifications, advanced control systems or combinations of these approaches. Inspection and periodic maintenance are required to ensure their continual effectiveness.
3. Any inspection method, if it is to be suitable, must be adaptable to future requirements, because

technology of emission control is changing. What is appropriate today may be obsolete a few years later.

4. It would not be prudent to embark at this time on an inspection program which requires permanently committed installations and large capital investments. Such a program should be amenable to easy modifications.

5. To be effective, a mandatory inspection and maintenance program must be manned by qualified personnel and the programs must be closely supervised.

VII. Recommendations

1. A statewide inspection program that requires the acquisition of State operated installations, dynamometers and testing equipment, not be established at this time.

2. A pilot inspection program using highly qualified stations be undertaken.

3. The pilot program should include determinations of:

   a. The applicability of annual inspection involving mandatory diagnosis, adjustment and repair to minimize motor vehicle emissions.

   b. The extent of upgrading service personnel needed and the means by which upgrading can be accomplished.

   c. The advantages and the problems of this inspection and maintenance system under actual operating conditions.

B. *1971 California Law Authorizing Retrofit Requirement to Reduce Oxides of Nitrogen**

The people of the State of California do enact as follows:

SECTION 1. Section 39107.6 is added to the Health and Safety Code, to read:

39107.6. Notwithstanding Section 39107, the board shall set standards for devices to significantly reduce the emission of oxides of nitrogen from the exhaust of 1966 through 1970 model year motor vehicles, as determined by the board from a representative sampling of such vehicles, which the board has found to be necessary and technologically feasible to carry out the purposes of this part.

In setting standards under this section, the primary consideration shall be the greatest possible reduction of oxides of nitrogen.

SEC. 2. Section 39177.1 is added to the Health and Safety Code, to read:

39177.1. (a) Whenever an exhaust emission control device meeting the standards established by the board under Section 39107.6 is accredited pursuant to the provisions of this article and is available for installation as determined by the board, every 1966 through 1970 model year motor vehicle having a manufacturer's gross vehicle weight rating of under 6,001 pounds, which is subject to registration in this state, shall be equipped with such accredited exhaust emission control device in accordance with a schedule of installation to be determined by regulation

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* Senate Bill No. 578, November 16, 1971.

adopted by the board, in consultation with the Department of the California Highway Patrol and the Department of Motor Vehicles.

(b) Enforcement of the provisions of subdivision (a) shall be as follows:

(1) Vehicle inspections shall be conducted pursuant to Section 2814 of the Vehicle Code.

(2) Certificates of compliance shall be required upon initial registration, and upon transfer of ownership and registration pursuant to Section 4000.1 of the Vehicle Code.

(3) Certificates of compliance shall be required upon renewal of registration for the year 1973, pursuant to Section 4602 of the Vehicle Code.

(4) By such other authorized means as the board, the Department of Motor Vehicles, and the Department of the California Highway Patrol find practicable.

(c) After one or more devices are initially accredited, no device shall be accredited which is less effective than the one or ones initially accredited. Any subsequent accreditation of a more effective device shall not affect the accreditation of a previously accredited device.

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SEC. 5. Section 39177.4 is added to the Health and Safety Code, to read:

39177.4. (a) Any manufacturer of a device required by Section 39177.1 shall, as a condition of accreditation of such device by the board, agree that until there are two or more accredited devices suita-

ble for installation on motor vehicles of the same classification, such classification to be determined by the board, the manufacturer shall, with respect to his device for such classification of motor vehicles, either: (1) agree to enter into such cross-licensing or other agreements as the board determines are necessary to insure adequate competition among manufacturers of such devices to protect the public interest; or (2) agree as a condition to such accreditation that, if only one such device from one manufacturer is made available for sale to the public, the board shall, taking into consideration the cost of manufacturing the device and the manufacturer's suggested retail price, and in order to protect the public interest, determine the fair and reasonable retail price of such device and may require, as a condition to continued accreditation of such device, that the retail price of such device, including installation, not exceed such price as determined by the board. In either event, the retail price so determined by the board for a device required by Section 39177.1 shall not be in excess of thirty-five dollars ($35) per vehicle, installed.

(b) Accreditation may be revoked by the board after a public hearing for which notice has been given to the applicant who obtained the accreditation, if the actual cost of the device installed exceeds the cost, installed, estimated, or agreed to by such applicant.

* * * *

SEC. 8. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting necessity are:

Presently required emission control devices for motor vehicles of 1966 through 1970 models do not eliminate enough of the oxides of nitrogen to insure the health and safety of the majority of California's citizens. It is now technically feasible to produce devices which will significantly reduce these dangerous substances. To insure that such devices are installed on most of such passenger vehicles within the shortest time possible, it is necessary to immediately begin programs for testing and approving such devices. Immediate passage of this act will also give manufacturers additional time to develop such devices.

C. *1971 Chicago Ordinance Requiring Inspection to Reduce Hydrocarbon and Carbon Monoxide Emissions**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. Chapter 17 of the Municipal Code of Chicago is hereby amended by adding a new article thereto to be designated Article IIA, Sections 17-2A.1 through 17-2A.7 inclusive, as follows:

ARTICLE IIA—AIR POLLUTION CONTROL: MOBILE SOURCES

* * * *

17-2A.2. It shall be unlawful within the City of Chicago on and after June 1, 1973 for any person

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* Chicago, Illinois, Amendment to Chapter 17 of the Municipal Code, Art. IIA, November 29, 1971.

to permit, allow or cause the operation of any spark ignition powered motor vehicle in the City of Chicago which emits carbon monoxide (CO) or hydrocarbons (HC) in the exhaust emissions of the vehicle in excess of the following standards when measured by an approved exhaust gas analytical system under test procedures propounded in the Code of Recommended Practices of the Department of Environmental Control:

Type of Vehicle	Model Year	Idle Exhaust Emission Standard: Hydrocarbons	Idle Exhaust Emission Standard: Carbon Monoxide
A. Non-Fleet	Pre-1968	1000 ppm	6.0%
Same	1968-1969	600	5.0
Same	1970 through 1974	500	4.0
Same	1975 and subsequent years	250	1.5
B. Fleet Vehicles	Pre-1968	600	5.0
Same	1968-1969	400	4.5
Same	1970 through 1974	300	3.5
Same	1975 and subsequent years	150	1.3
C. Passenger Carriers for Hire	Pre-1968	400	3.0
Same	1968-1969	300	2.0
Same	1970 through 1974	300	1.5
Same	1975 and subsequent years	100	0.8

D. All vehicles are required to have lower hydrocarbon and carbon monoxide emissions at 2250 plus or minus 250 rpm speed than at idle.

17-2A.3. It shall be unlawful within the City of Chicago on and after June 1, 1973 for any person to permit, allow or cause the operation of any spark ignition powered motor vehicle which emits visible smoke in the exhaust emissions at the exhaust outlet greater than No. 1 Ringlemann or equivalent.

17-2A.4. It shall be unlawful within the City of Chicago on and after June 1, 1973 for any person to permit, allow or cause the operation of any diesel-powered motor vehicle in the City of Chicago which emits smoke in the exhaust emissions of the vehicle in excess of the following standards when measured by an approved smokemeter under test procedures propounded in the Code of Recommended Practices of the Department of Environmental Control:

Type of Vehicle	Model Year	Mode of Test	Smoke Opacity Permissible
All	All	lugging	20%
All	All	accelerating	40%

17-2A.5. On and after June 1, 1973, every motor vehicle registered or subject to registration in the City of Chicago shall be inspected and tested annually for compliance with the emission standards established in Sections 17-2A.2, 17-2A.3 and 17-2A.4. The inspection and testing shall be performed at testing stations operated or designated by the Department of Environmental Control and in accordance with a schedule established by the Commissioner. The Commissioner shall issue a certificate of compliance to the registered owner of motor vehicles tested and found in compliance with the emission standards established by this Article IIA and it shall be unlawful for any person to permit, allow or cause the operation of any motor vehicle registered or subject to registration in the City of Chicago without first having secured said certificate of compliance; provided, however, that nothing herein contained shall excuse any person owning or operating a motor vehicle from maintaining said vehicle within the standards set forth in Sections 17-2A.2, 17-2A.3 and 17-

2A.4 of this Article on and after June 1, 1973; and provided, further, however, that nothing herein contained shall be deemed to preclude any appropriate enforcement agency from requiring a reinspection of any motor vehicle at such reasonable time or times as may be necessary following the certification herein provided.

* * * *

SECTION 2. This ordinance shall take effect on and after ten days from the date of its due passage and publication.

D. *Proposed New Jersey Law Requiring Inspection to Reduce Hydrocarbon and Carbon Monoxide Emissions**

TAKE NOTICE, that the New Jersey State Department of Environmental Protection will hold a public hearing on proposed Chapter 15 of the New Jersey Air Pollution Control Code: CONTROL AND PROHIBITION OF AIR POLLUTION FROM LIGHT-DUTY GASOLINE-FUELED MOTOR VEHICLES.

* * * *

This hearing will be held in accordance with the provisions of the Air Pollution Control Act (1954) as amended by Chapter 106, P.L. 1967.

It is recommended that at the time of the public hearing or prior thereto, a brief or briefs be submitted to the department on all matters desired to

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* New Jersey State Department of Environmental Protection, Notice of Public Hearing on Air Pollution Control Code, Proposed Chapter 15 (May 27, 1971).

be brought to the attention of the department concerning the provisions of the proposed new code Chapter 15.

The text of the code chapter to be considered in the public hearing is presented on the following pages.

* * * *

Section 1 DEFINITIONS:

1.1 PERSON: Includes corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals, and shall also include all political subdivisions of this State or any agencies or instrumentalities thereof.

1.2 MOTOR VEHICLE: Includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks.

* * * *

Section 2 PUBLIC HIGHWAY STANDARD:

No person shall operate any gasoline-fueled, light-duty motor vehicle or permit such vehicle which he owns to be operated upon the public highways of the State if the vehicle emits visible smoke in the exhaust emissions or in the crankcase emissions.

Section 3 INSPECTION STANDARD:

3.1 Any gasoline-fueled, light-duty motor vehicle which is subject to inspection required by the Division of Motor Vehicles, as a condition of compliance with said inspection, shall not emit visible smoke in the exhaust emissions or in the crankcase emissions.

3.2 Any gasoline-fueled, light-duty motor vehicle which is subject to inspection required by the Division of Motor Vehicles, as a condition of compliance with said inspection after the effective dates set forth in Table I, shall not emit carbon monoxide (CO) and/or hydrocarbons (HC) in the exhaust emissions in excess of the standards set forth in Table I, when measured using an approved exhaust gas analytical system and the prescribed inspection test procedure.

Section 4 EXCEPTION:

The provisions of Section 3.2 of this Chapter shall not apply to motorcycles.

TABLE I

INSPECTION STANDARDS

VEHICLES SUBJECT TO INSPECTION REQUIRED BY THE DIVISION OF MOTOR VEHICLES

(Reference P.L. Title 39:8-10)

MODEL YEAR OF VEHICLE	EFFECTIVE 1972		EFFECTIVE 1973	
	CO(%)	HC(PPM)	CO(%)	HC(PPM)
Up to and including 1967	7.5	1200	6.0	1000
1968-1969	5.0	600	4.0	500
1970 and Later	4.0	400	3.0	300

* * * *

BASIS FOR PROPOSED CHAPTER 15

AUTOMOTIVE AIR POLLUTION IN NEW JERSEY

New Jersey is particularly vulnerable to pollution from automotive sources because it has the highest density of motor vehicles in the United States—440

per square mile as of December 1969. In the metropolitan area, this density is much higher. Hudson County, for example, has 4,780 vehicles per square mile. Because of this heavy concentration, it is mandatory that all emissions which pollute the atmosphere be held to the minimum attainable through reasonable regulation.

The ultimate goal of controlling and prohibiting air pollution from light duty gasoline-fueled motor vehicles is, of course, to eliminate motor vehicle emissions as an air pollution problem. The inspection test prescribed in proposed Chapter 15 will be a significant step toward attaining this goal. A periodic check on emissions from New Jersey vehicles will be provided.

General Effects of Motor Vehicle Emissions on New Jersey's Air

The Federal Environmental Protection Agency has issued outdoor air quality standards for several pollutants which are primarily products of engine combustion processes and evaporation of gasoline. Among these are standards for carbon monoxide and hydrocarbons (for which New Jersey inspection standards are now proposed) and nitrogen dioxide. Federal air quality standards also have been issued for photochemical oxidants, which result from interactions between hydrocarbons and nitrogen oxides in the outdoor air after they have been emitted by vehicles or other sources.

A description of the effects of these pollutants and a comparison of New Jersey's air quality with the standards follow.

CARBON MONOXIDE (CO): Carbon monoxide is a colorless, odorless gas which affects human beings by depriving the blood of oxygen. In sufficiently high concentrations, carbon monoxide can cause death by suffocation. However, lesser concentrations in confined areas, such as jammed streets or expressways, can affect human response time in varying degrees.

* * * *

HYDROCARBONS (HC): Hydrocarbon concentrations in the outdoor air normally are not sufficient to have direct health effects on people. But, when the hydrocarbons react with oxides of nitrogen in the outdoor air, irritating photochemical oxidants (smog) result under certain weather conditions. The level of reactive hydrocarbons present during the morning hours determines the level of photochemical oxidants which can be formed later in the day if bright sunshine is present.

* * * *

NITROGEN OXIDES (NO_x): Nitrogen oxides are important to the formation of photochemical oxidants. In addition, one of the nitrogen oxides, nitrogen dioxide (NO_2), is directly toxic to human beings and can affect the respiratory system. The Federal standard for nitrogen dioxide in the outdoor air is 100 micrograms per cubic meter of air (0.05 parts per million) annual arithmetic mean. This standard was met at the three monitoring sites in New Jersey in 1970 . . . . However, concentrations of total nitrogen oxides in the air still are sufficient for photochemical oxidant formation on certain days.

* * * *

PHOTOCHEMICAL OXIDANTS (O_x): Eye irritation and respiratory impairment are two undesirable ef-

fects of photochemical oxidants. Persons suffering from respiratory ailments are particularly affected. The process of oxidant formation is complex, requiring the presence of bright sunlight and relatively still air, as well as the proper mixture of hydrocarbons and nitrogen oxides in the air. Outdoor air quality monitoring data give ample evidence that oxidant formation can and does occur in New Jersey.

* * * *

Laboratory studies conducted by various researchers suggest that, while hydrocarbons and nitrogen oxides both are necessary precursors of photochemical oxidants, reduction in hydrocarbons should be the primary step for oxidant control. New Jersey's proposing of motor vehicle inspection standards for hydrocarbons and carbon monoxide, but not for nitrogen oxides at this time, is basically in conformance with this finding.

SMOKE: Visible smoke is another form of air pollution from motor vehicles which is particularly objectionable to the public. In addition to being a nuisance to the motorist following a smoky vehicle, excessive smoke gives rise to general visibility reduction, eye irritation and damage to materials.

SUMMARY OF GENERAL EFFECTS: The data presented above are highly condensed from several years of measurements and study of air pollution levels in New Jersey. They are intended only to provide some explanation of the complex issues involved in assessing the impact of certain specific types of automotive exhaust emissions on the outdoor air.

The background of scientific information relating to the photochemical oxidant phenomenon (smog)

resulting from NO_x and HC reactions in the outdoor air draws heavily upon studies conducted in Los Angeles, California. There is reason to believe that the behavior and effects of these pollutants in New Jersey are similar to those which occur in Los Angeles, although the effects are not yet so severe or serious.

It can be stated in general that hydrocarbons, which contribute to photochemical smog, affect wide areas of the state, and that hydrocarbons exhausted from vehicles in one part of the state can have an effect on air quality many miles distant. Carbon monoxide, on the other hand, has its harmful effects within the immediate vicinity of dense traffic, and may have little significant consequence a few thousand feet away. Carbon monoxide is essentially a center city problem.

Unnecessary emissions of hydorcarbons and carbon monoxide must be reduced, if the threat of motor vehicle pollution is to be reduced.

* * * *

NECESSITY FOR STATE CONTROL

In order to assure that vehicles manufactured with control devices continue to perform with a reasonable degree of effectiveness, some form of inspection must be implemented by the State. It is well recognized that proper maintenance of engines and control systems would be a major step toward improved vehicle emission control.

* * * *

1967 AND EARLIER MODEL YEARS: Automobiles produced prior to 1968 were not equipped with systems designed to meet any legal requirements for air pollution control. However, beginning in 1963 vehicle

manufacturers did voluntarily install crankcase ventilating devices for reducing hydrocarbon emissions in the form of raw gasoline. This source of emission, which results from gasoline being blown by the piston rings, is commonly referred to as "engine blowby." Proper maintenance of these blowby control devices is vitally necessary if they are to continue to be effective and to prevent engine damage. Although State inspection of these systems would be desirable, the procedure for testing is not well adapted to the New Jersey motor vehicle inspection system, and no standard for this source is proposed.

Excessive and unreasonably high levels of tailpipe exhaust emissions from vehicles of this model year group result when engines are improperly maintained or are out of tune. Studies conducted by the department indicate that, if the engines of all pre-1968 cars exceeding the proposed standards were to be properly tuned and maintained, the concentration, as measured at the tailpipe, of the carbon monoxide emissions from this group of vehicles could be reduced by as much as 56 percent and hydrocarbons by 55 percent. The proposed standards, to become effective in 1972, would require engine maintenance on about 38 percent of the vehicles registered this year in New Jersey, or 783,000 pre-emissions control vehicles. The 1973 standards would require about 50 percent to be serviced.

It may initially appear that the proposed standards are unusually restrictive. However, the department has tested and systematically maintained many of these excessively emitting vehicles. Corrective maintenance has reduced emission levels of such vehicles well below the standard. Proper tuning of pre-emis-

sions-control vehicles to meet the proposed 1973 standards would reduce the total emissions of carbon monoxide and hydrocarbons entering New Jersey's outdoor air by 12 percent and 26 percent respectively.

1968-69 MODEL YEARS: Vehicles manufactured during these model years were equipped with exhaust emission control systems or devices in accordance with Federal requirements. Improper or inadequate maintenance of the engine and/or the emission control systems can cause unnecessarily high emissions of carbon monoxide or hydrocarbons. Studies conducted by the department indicate that proper maintenance of these vehicles would reduce the concentration, as measured at the tailpipe, of carbon monoxide emissions by 68 percent and of hydrocarbon emissions by 63 percent. The standards proposed to become effective in 1972 would require approximately 36 percent of these vehicles to be serviced, and the 1973 standards approximately 45 percent. Approximately 275,000 vehicles would be affected by the 1972 standards, and 351,000 a year later. The resulting reduction of total emissions as measured in the atmosphere would be on the order of 6 percent carbon monoxide and 5 percent hydrocarbons with the 1973 standards.

1970 AND LATER MODEL YEARS: Motor vehicles manufactured during these model years are equipped with advanced design emission control systems or devices. Again proper engine maintenance and maintenance of the control systems and devices is vital if these vehicles are to perform in such manner as to benefit from legal and technological advancements. Based on somewhat limited studies, the department's data indicate that about 28 percent of these vehicles

would fail inspection, and would require tune-up to meet the 1973 standards. The data gathered by the department suggest a concentration reduction of 82 percent for carbon monoxide emissions and 44 percent for hydrocarbon emissions would be achieved. This reduction would reduce total carbon monoxide by 2 percent in 1973, and total hydrocarbons would be reduced by 1 percent. Percent reductions in this group would increase in time as more vehicles in this class are purchased and as they come to require maintenance.

* * * *

The establishment of inspection standards for all New Jersey vehicles can make a significant contribution to improved air quality, particularly in urban areas. However, to assure meeting outdoor air quality standards, further tightening of inspection procedures and standards and perhaps more restrictive controls on motor vehicle emissions and traffic flow must be envisioned for the future.

The concept as offered in this proposal can make a significant start toward reducing air pollution from motor vehicles by assuring that vehicles with control devices continue to perform properly. At the same time, it will create an awareness on the part of the motoring public, the automotive service industry and the automobile manufacturing industry of a need to share in the responsibility for cleaning New Jersey's air.

ITEM 7—California Experience with Exhaust Control Devices, 1964-1965

A. *Approval of Three Exhaust Devices for Factory Installation on New 1966 Model Vehicles**

WHEREAS, Walker Manufacturing Company, a subsidiary of Kern County Land Co., Inc. and American Cyanamid Co., Inc. filed a joint application for approval of an exhaust emission control system on September 14, 1961; and

WHEREAS, the system is described as the Walker-Cyanamid Exhaust Control System, with major components comprised as follows:

1. A catalytic exhaust converter (with no over-temperature bypass),
2. A diaphragm-type air pump,
3. A Carburetor throttle positioner, and
4. Specified engine adjustments and Annual tune-up;

* * * *

WHEREAS, Arvin Industries, Inc. and Universal Oil Products, Inc. filed a joint application for approval of an exhaust emission control system on February 16, 1961; and

WHEREAS, the system is described as the Arvin-UOP Exhaust Control System, with major components comprised as follows:

1. A catalytic exhaust converter (with no over-temperature bypass), and
2. A diaphragm-type air pump;

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*California Motor Vehicle Pollution Control Board, Resolutions 64-12, 64-14 and 64-15 (June 17, 1964).

WHEREAS, W. R. Grace & Co., Inc. and Norris Thermador Corp. filed a joint application for approval of an exhaust emission control system on May 15, 1961; and

WHEREAS, the system is described as the Grace-Norris Exhaust Control System, with major components comprised as follows:

1. A catalytic exhaust converter (with an over-temperature bypass),
2. A rotary vane-type air pump, and
3. Exhaust valve air injection;

WHEREAS, the Motor Vehicle Pollution Control Board finds that [these systems comply] with the exhaust emission standards of the State Department of Public Health of 275 PPM of hydrocarbons and 1.5% of carbon monoxide, as established pursuant to Sections 426.1 and 426.5 of the Health and Safety Code, State of California, and as determined according to established procedures of the Board; and

WHEREAS, based upon demonstrations of compliance with established procedures, the Board finds that [these systems meet] the criteria of the Board, as published in Title 13 of the California Administrative Code, Chapter 3, Subchapter 1, Article 2, Section 2103.

THEREFORE, BE IT RESOLVED,

That this Board, under the powers and authority granted in Chapter 3, (Commencing at Section 24378) Division 20 of the Health and Safety Code,

Issue a certificate of approval for the [Walker-Cyanamid Exhaust Control System, Arvin-UOP Exhaust Control System, and Grace-Norris Exhaust

Control System] for new 1966 and subsequent model motor vehicles, factory installation, in classifications (b), (c), (d), (e) and (f), pursuant to Title 13, California Administrative Code, Chapter 3, Subchapter 1, Article 2, Sections 2104 and 2105.

B. ***Approval of One Exhaust Device for 1962 and Subsequent Model Vehicles****

WHEREAS, American Machine and Foundry Co., Inc. and Chromalloy Corporation, filed a joint application for approval of an exhaust emission control system on March 7, 1961; and

WHEREAS, the system is described as the AMF-Chromalloy Mark XII-W "Smog Burner", with major components comprised as follows:

1. A direct-flame exhaust converter (with modulating bypass valve),
2. A venturi for secondary air induction,
3. A specially calibrated carburetor, and
4. Specified engine adjustments and annual tune-up;

WHEREAS, the Motor Vehicle Pollution Control Board finds that the system complies with the exhaust emission standards of the State Department of Public Health of 275 PPM of hydrocarbons and 1.5% of carbon monoxide, as established pursuant to Sections 426.1 and 426.5 of the Health and Safety Code, State of California, and as determined according to established procedures of the Board; and

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* California Motor Vehicle Pollution Control Board, Resolution 64-13 (June 17, 1964).

WHEREAS, based upon demonstration of compliance with established procedures, the Board finds that the system meets the criteria of the Board, as published in Title 13 of the California Administrative Code, Chapter 3, Subchapter 1, Article 2, Section 2103.

THEREFORE, BE IT RESOLVED,

That this Board, under the powers and authority granted in Chapter 3, (Commencing at Section 24378) Division 20 of the Health and Safety Code,

Issue a certificate of approval for the AMF-Chromalloy Mark XII-W "Smog Burner" for 1962 and subsequent model motor vehicles, in classifications (b), (c), (d), (e) and (f), pursuant to Title 13, California Administrative Code, Chapter 3, Subchapter 1, Article 2, Sections 2104 and 2105.

C. ***Staff Report on Device Approved for 1962 and Subsequent Model Vehicles****

Based on the test data and information submitted by the applicant, the Staff concludes as follows:

1. The AMF-Chromalloy exhaust control device system complies with the emission standards of the State Department of Public Health of 275 PPM of hydrocarbons and 1.5% carbon monoxide, as determined according to the established procedures of the Board.

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* California Motor Vehicle Pollution Control Board, Summary of Report on Exhaust Control Devices of American Machine & Foundry Company—Chromalloy Corporation, June 10, 1964, at 3-4.

2. The system complies with the Board's criteria with the following exceptions:

   (a) Adequate service life data beyond 12,000 miles are as yet lacking, nor has a specific warranty been finalized;

   (b) Comprehensive device servicing plans of the applicant beyond one year, in order that adequate performance, commensurate with the test data, be ensured, are as yet lacking;

   (c) Cost data concerning net cost of the device to the consumer is not completely definitive.

3. Affirmative action by the Board for factory installation approval implies heavy reliance on the applicant and the automobile manufacturer who utilizes the device, to scale up production of it, to correct slight malfunctions in it, and to adapt it to the variety of vehicle model options involved, without sacrificing its performance or durability.

4. A Device Servicing System which ensures proper annual maintenance of the control system is absolutely essential before the contribution of this device to reducing vehicular pollution will correspond to the emission reductions claimed for the device.

5. Because of items 3 and 4 above, it is considered necessary that the applicant be capable of, and willing to, stand behind his product during the life of the vehicles upon which it is ultimately installed.

F. STAFF RECOMMENDATIONS

1. The staff recommends certification of the AMF-Chromalloy exhaust control device.

2. The Staff further recommends that continued approval be understood to be contingent upon the applicant submitting monthly progress reports to the Board during the period prior to the time that devices are installed on vehicles, and at appropriate intervals thereafter; and that such reports show satisfactory progress in overcoming the problems cited in the conclusions above.

D. *Report to Legislature on Costs of Exhaust Devices for Used Cars**

LOUIS FULLER, APCO, LOS ANGELES COUNTY AIR POLLUTION CONTROL DISTRICT: Thank you Mr. Chairman and members of the committee, I have presented today to the Los Angeles County Board of Supervisors a report which is an analysis in depth of the existing legislation controlling motor vehicles. It takes into consideration the impact of the federal legislation, whereby the Secretary of Health, Education and Welfare, is now empowered to set standards of emissions from motor vehicles starting in the year 1968. A number of other factors are also considered in making this report: The rate at which vehicles are disappearing off the road because of age; the impact of the rising population, not only of peo-

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* Transcript, Assembly [of the State of California] Committee on Transportation and Commerce, March 8, 1966: Hearing on Air Pollution Control, at 2-4.

ple, but of motor vehicles; the extent to which gasoline is being consumed, and the projections of the use of gasoline in the future. These are the facts gentlemen, which are contained in that report.

* * * *

Assuming that there were devices to control the exhaust which were applicable, which could be installed on used vehicles, if there were such devices, which there are not at the present time, and if they could be installed in the years 1960 through 1965, during the three year period 1968 through 1970 you would have an initial reduction of 420 tons per day . . . .

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However, I think you have to consider that number one, there are no devices, and number two, the price ceiling of $65 including the installation cost, is something which does not intrigue the manufacturers of the devices, plus the fact that if and when a device were perfected, it would take some time for it to be throughly tested and approved. Then there would be the year of waiting before this device could become effective. And you have the tuning up, the production, distribution, and installation so actually you are talking about another three years, assuming that a device could be perfected this year. Now you will achieve practically the same results by the disappearance of the old vehicles off the highways.

ASSEMBLYMAN DANNEMEYER: Isn't there one device on the market now?

MR. FULLER: Not to my knowledge sir.

ASSEMBLYMAN DANNEMEYER: From our hearings last year I seem to recall that there was one device.

MR. FULLER: There was a device it was approved, but the price ceiling knocked that out. They cannot compete with the $65 price.

ASSEMBLYMAN DANNEMEYER: What price did they have.

MR. FULLER: I think they were around $85 to $90.

ASSEMBLYMAN DANNEMEYER: We had a device at the last session, didn't we, that would sell for $65?

MR. FULLER: I think Mr. Norris, or Norris Thermador did.

ASSEMBLYMAN DANNEMEYER: Is he out of the picture or something?

MR. FULLER: Yes, he is concerned about the fact that it takes two approved devices plus the fact that he doesn't know what action the Legislature might take before he would invest some millions of dollars in production of such a device. He would like to have some assurance, at least this is the indication I get.

MR. FRANCIS McLAUGHLIN, REPRESENTING LOS ANGELES COUNTY BOARD OF SUPERVISORS: Mr. Dannemeyer, as I recall we did have one approved device but as you recall the law stated that there had to be two or more devices approved.

ASSEMBLYMAN DANNEMEYER: Is there a company today that will produce and install an exhaust device at a cost not to exceed $65?

MR. FULLER: Not to my knowledge.

E. *Commendation of General Motors, Ford, Chrysler and American Motors for Contributions to California Emissions Control Program**

WHEREAS, [General Motors Corporation, Ford Motor Company, Chrysler Corporation and American Motors Corporation have] actively cooperated with the State of California in its program to control emissions from motor vehicles and;

WHEREAS, this assistance has included guidance and technical help on testing, development of instrumentation, including actual experimentation with cars and devices and;

WHEREAS, much basic research by [the companies named above have] materially assisted the State of California in defining its air pollution problem as a first step toward solution and;

WHEREAS, [the companies named above], together with other car companies, voluntarily installed crankcase control systems on 1961 model California vehicles and;

WHEREAS, on August 12, 1964, [the companies named above] told the Motor Vehicle Pollution Control Board in San Francisco they would meet California requirements for exhaust emission control for most 1966 model new vehicles sold in this State,

THEREFORE, BE IT RESOLVED,

That the California Motor Vehicle Pollution Control Board;

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* California Motor Vehicle Pollution Control Board, Resolutions 64-18, 64-19, 64-20, and 64-21 (August 12, 1964).

1. Congratulates [the companies named above] on this significant contribution to the health and well being of the citizens of California and further
2. Urges [the companies named above] to continue their outstanding developmental efforts to better control emissions from their motor vehicles.

F. *Approval of Chrysler Exhaust Emission Control System for New 1966 and Subsequent Model Vehicles**

WHEREAS, Chrysler Corporation filed an application for approval of an exhaust emission control system on July 11, 1963; and

WHEREAS, the system is described as the Chrysler "Cleaner Air Package" with major components comprised as follows:

1. A vacuum-controlled valve for deceleration ignition advance
2. Leaner carburetion
3. Retarded ignition at idle
4. Specified annual engine tuneup and adjustments

WHEREAS, the Motor Vehicle Pollution Control Board finds that the system complies with the exhaust emission standards of the State Department of Public Health of 275 PPM of hydrocarbons and 1.5% of carbon monoxide, as established pursuant to Sections 426.1 and 426.5 of the Health and Safety Code, State of California, and as determined according to established procedures of the Board; and

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* California Motor Vehicle Pollution Control Board, Resolution 64-36 (November 18, 1964).

WHEREAS, based upon demonstration of compliance with established procedures, the Board finds that the system meets the criteria of the Board, as published in Title 13 of the California Administrative Code, Chapter 3, Subchapter 1, Article 2, Section 2103,

NOW THEREFORE, BE IT RESOLVED,

That this Board, under the powers and authority granted in Chapter 3, (Commencing at Section 24378) Division 20 of the Health and Safety Code,

Issue a certificate of approval for the "Chrysler Cleaner Air Package" for 1966 and subsequent model Chrysler Corporation motor vehicles in classifications (b), (c), (d), (e) and (f), pursuant to Title 13, California Administrative Code, Chapter 3, Subchapter 1, Article 2, Sections 2104 and 2105.

G. ***Approvals of General Motors, Ford, American Motors, International Harvester and Kaiser-Jeep Systems for New 1966 and Subsequent Model Vehicles****

WHEREAS, General Motors Corporation filed an application for approval of an exhaust emission control system on October 5, 1964; and

WHEREAS, the system is described as the General Motors "Air Injection Reactor" with major components comprised as follows:

1. engine driven air pump
2. air injection into each exhaust port

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* California Motor Vehicle Pollution Control Board, Resolutions 65-17, 65-18, 65-19, 65-20 and 65-21 (July 14, 1965).

3. carburetor and distributor modifications
4. recommended annual maintenance; and

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WHEREAS, Ford Motor Company filed an application for approval of an exhaust emission control system on September 1, 1964; and

WHEREAS, the system is described as the Ford "Thermactor" with major components comprised as follows:

1. Engine-driven air pump
2. Air injection into each exhaust port
3. Carburetor and distributor modifications
4. Recommended annual maintenance

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WHEREAS, American Motors Corporation filed an application for approval of an exhaust emission control system on October 28, 1964; and

WHEREAS, the system is described as the American Motors "Air Guard" System with major components comprised as follows:

1. engine-driven air pump
2. air injection into each exhaust port
3. carburetor and distributor modifications
4. annual maintenance

* * * *

WHEREAS, International Harvester Company filed an application for approval of an exhaust emission control system on March 22, 1965; and

WHEREAS, the system is described as the International Harvester Air Injection Exhaust Control System with major components comprised as follows:

1. engine-driven air pump
2. air injection into each exhaust port
3. carburetor and distributor modifications
4. piston modifications on some engines
5. recommended annual maintenance

* * * *

WHEREAS, Kaiser-Jeep Corporation filed an application for approval of an exhaust emission control system on October 28, 1964; and

WHEREAS, the system is described as the "Air Guard" System with major components comprised as follows:

1. engine-driven air pump
2. air injection into each exhaust port
3. carburetor and distributor modifications
4. annual recommended maintenance

WHEREAS, the Motor Vehicle Pollution Control Board finds that [these systems comply] with the exhaust emission standards of the State Department of Public Health of 275 PPM of hydrocarbons and 1.5% of carbon monoxide, as established pursuant to Sections 426.1 and 426.5 of the Health and Safety Code, State of California, and as determined according to established procedures of the Board; and

WHEREAS, based upon demonstration of compliance with established procedures, the Board finds that [these systems meet] the criteria of the Board, as published in Title 13 of the California Administra-

tive Code, Chapter 3, Sub-chapter 1, Article 2, Section 2103.

NOW THEREFORE, BE IT RESOLVED,

That this Board, under the powers and authority granted in Chapter 3, (Commencing at Section 24378) Division 20 of the Health and Safety Code,

Issue a certificate of approval for factory installation of [these systems for 1966 and subsequent model engines in specific classifications], pursuant to Title 13, California Administrative Code, Chapter 3, Sub-chapter 1, Article 2, Sections 2104 and 2105.

H. *Exemption of Two Percent of 1966 Model Vehicles from Exhaust Control Requirements**

WHEREAS Section 24385(5) of the Health and Safety Code provides that the Motor Vehicle Pollution Control Board shall exempt classifications of vehicles from the mandatory provisions of the law when it is found that a device "not available"; and

WHEREAS after appropriate hearings this Board has found that there is, in fact, no exhaust control systems available for certain 1966 makes and models of motor vehicles; and

WHEREAS this non-availability is due primarily to the fact that at this time there is no practical engineering method to control these vehicles; and

---

* California Motor Vehicle Pollution Control Board, Resolution 64-2 (January 20, 1965) (exhibit amended on six subsequent occasions through Jan. 11, 1966).

WHEREAS this exemption applies to only approximately 2% of the total estimated sale of American made passenger cars and commercial vehicles including half ton pick-up trucks.

NOW, THEREFORE, BE IT RESOLVED, That

1. The list of vehicles contained in Exhibit A attached to and made a part of this resolution [exhibit omitted] shall be exempt from the mandatory provisions of the Health and Safety Code and Motor Vehicle Code in respect to exhaust controls; and
2. This exemption shall apply to 1966 model new vehicles only.

I. *Effective Decertification of Exhaust Controls Not Developed by Vehicle Manufacturers**

WHEREAS the 1965 regular session of the State Legislature passed, and the Governor signed into law, legislation which establishes new laws and legislative policy for motor vehicle air pollution control, and

WHEREAS exhaust emission control devices approved prior to July 13, 1965, were evaluated, tested, and certified by this Board based upon State law and rules and regulations which have now been changed by this legislative action, and

WHEREAS these changes must be recognized and supported by appropriate Board action.

---

* California Motor Vehicle Pollution Control Board, Resolution 65-26 (September 15, 1965); IV [California] Motor Vehicle Pollution Control Board Bulletin 1 (September 1965).

NOW, THEREFORE BE IT RESOLVED that the Certificates of Approval of Exhaust Emission Control Devices, for new cars which are not now in production and which were certified by this Board prior to July 13, 1965, shall be restricted to the extent that they shall be applicable only when the laws of this State provide for periodic compulsory servicing of exhaust control devices, and

BE IT FURTHER RESOLVED that the Certificates of Approval of Exhaust Emission Control Devices for new cars which are now in production and which were certified by this Board prior to July 13, 1965, shall be valid for the 1966 model year only, and

BE IT FURTHER RESOLVED that any exhaust device approved prior to July 13, 1965, for used cars shall be considered valid only when its cost is in compliance with the limitations in this respect which have been imposed upon used vehicle installations by the laws of this State.

BOARD RESTRICTS DEVICE APPROVAL

Unanimous action by the Motor Vehicle Pollution Control Board, meeting in San Francisco Sept. 15, restricted certification of four previously approved exhaust control systems and limited use of a fifth to 1966 model vehicles only.

The action was taken in the light of legal exclusion of mandatory maintenance for the systems. Without required annual maintenance, the Board expressed doubt that the systems would meet State standards after a year's normal operation.

At the same time, the Board was concerned over the cost to the consumer. Faced with a price limit for used vehicle exhaust controls set by the Legislature, Board members felt costs for the muffler-type system previously ok'd for used cars failed to meet that criterion.

"This does not mean that exhaust controls will not go on 1966 California vehicles," William Nissen, chairman, emphasized. "The Chrysler Cleaner Air Package is already being installed on '66 models rolling off the assembly lines, while GM, Ford, Rambler, Kaiser-Jeep and International Harvester are equipping their new cars with various versions of the air injection reactor system.

"What this does mean is that California must insist on more stringent testing methods for exhaust controls so that they can meet requirements with the maintenance practices presently typical of most California car owners," Nissen stated.

IN THE

Supreme Court of the United States

October Term, 1971
No. 45 Original

Supreme Court, U.S.
FILED
FEB 19 1972
E. ROBERT SEAVER, CLERK

STATE OF WASHINGTON, STATE OF ILLINOIS,
STATE OF ARIZONA, STATE OF COLORADO,
STATE OF HAWAII, STATE OF IOWA,
STATE OF KANSAS, STATE OF MAINE,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF MINNESOTA, STATE OF MISSOURI,
STATE OF OHIO, STATE OF RHODE ISLAND,
STATE OF VERMONT and COMMONWEALTH OF VIRGINIA,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
FORD MOTOR COMPANY,
a Delaware corporation,
CHRYSLER CORPORATION,
a Delaware corporation,
AMERICAN MOTORS CORPORATION,
a Maryland corporation,
AUTOMOBILE MANUFACTURERS ASSOCIATION,
a New York corporation,
Defendants.

PLAINTIFFS' MEMORANDUM ON CHOICE OF SUBSTANTIVE LAW AND BRIEF IN REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

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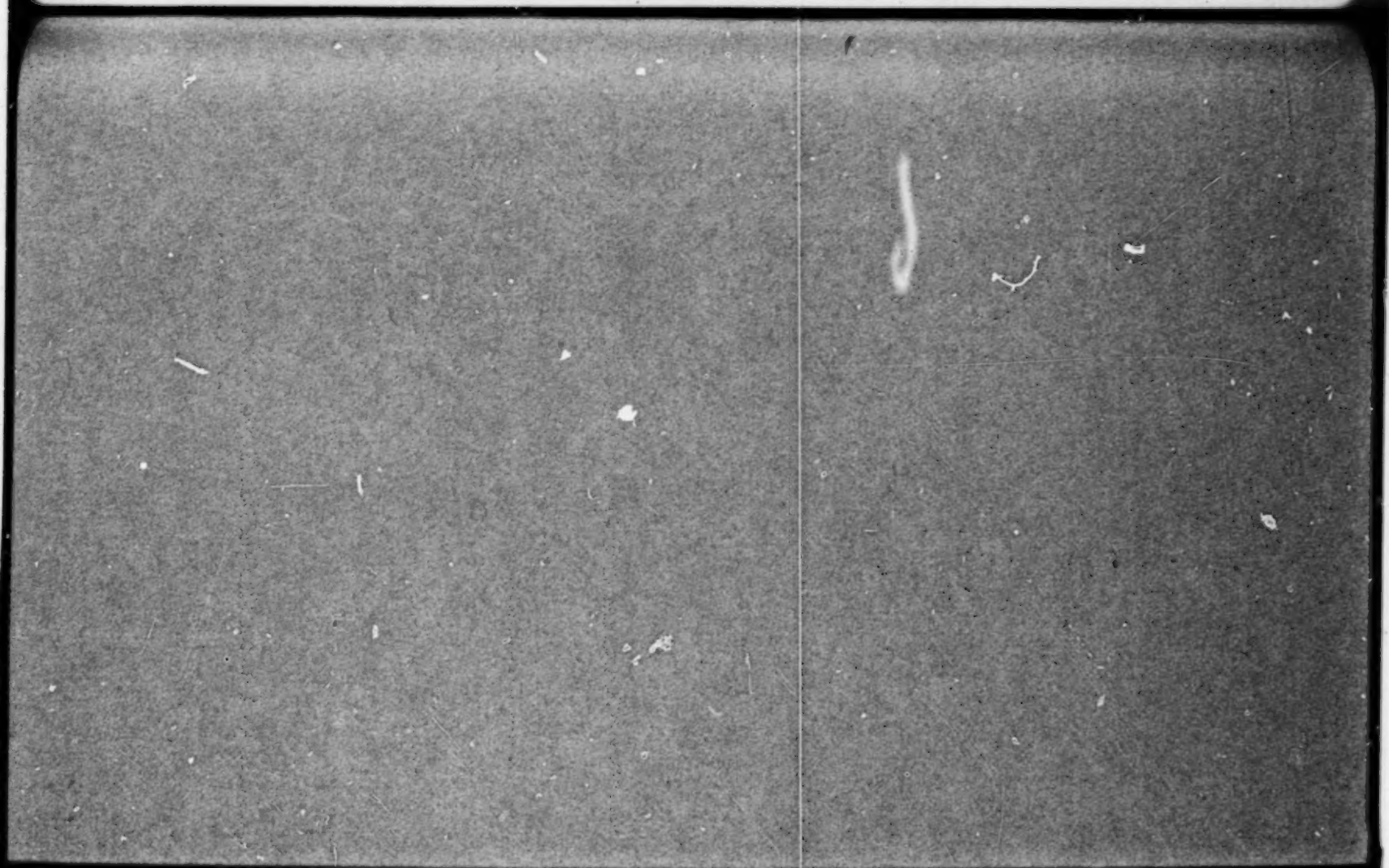

SUBJECT INDEX

	Page
Introductory Statement	1
Argument	2
Part I. Choice of Substantive Law	2
1. Federal Law Governs the Substantive Issues in This Action.	2
2. Plaintiffs Strike Count III.	4
3. Count II Will Probably Not Be Reached. If It Is, It Is Controlled by State Common Law, and Is a Claim Pendent to Count I.	4
4. The Federal Law Questions Require Determination by This Court.	5
Part II. Reply to Defendants' Supplemental Memorandum	8
5. *Georgia v. Pennsylvania R. Co.*, and *Ohio v. Wyandotte Chemicals Corp.*, Support an Exercise of Original Jurisdiction in This Case. (Reply to Def. Supp. Mem. pp. 5-8)	8
6. There Is No Right to a Jury Trial in This Case. (Reply to Def. Supp. Mem. p. 14)	10
7. Collateral Estoppel Will Not Impair the Right to Jury Trial. (Reply to Def. Supp. Mem. p. 14)	12
8. This Court Can Handle This Case Efficiently and Expeditiously With a Special Master. (Reply to Def. Supp. Mem. pp. 13-14)	13
9. The Equitable Relief Sought by Plaintiff States Is the Most Appropriate Remedy for the Continuing Loss or Damage Caused by Defendants' Alleged Sherman Act Violations. The Clean Air Amendments of 1970 in No Way Detract From the Traditional Powers of an Equity Court Sitting in an Antitrust Case. (Reply to Def. Supp. Mem. pp. 15-33)	15

Page

10. In Any Event, Defendants' Argument Regarding Relief Is Totally Premature. (Reply to Def. Supp. Mem. pp. 15-33) 19

Part III. Recent Developments 20

11. Recent Developments Confirm the Need for Original Jurisdiction to be Exercised. 20

Conclusion 27

Appendices:

Appendix A A-1

Appendix B A-4

TABLES OF AUTHORITY

Table of Cases

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 689 (1946) 14

Associated Press v. United States, 326 U.S. 1 (1945) 18

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 10, 11, 12

Blonder-Tongue v. University Foundation, 402 U.S. 313, 320-27 (1971) 11

Bowles v. Carnegie-Illinois Steel Corp., 149 F.2d 545 (7th Cir., 1945) 6

Cannon v. Texas Gulf Sulphur Co., 323 F. Supp. 990 (S.D.N.Y., 1971) 13

Dairy Queen Inc. v. Wood, 369 U.S. 469 (1962) 11-12

Dyker Bldg. Co. v. United States, 182 F.2d 85 (D.C. Cir., 1950) 14

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1949) 8, 10

Grove Laboratories v. Brewer & Co., 103 F.2d 175 (1st Cir., 1939) 6

Page

Kennard v. Cory Brothers & Co., [1922] L.R. 1 Ch. 265 (C.A.) 16

LaBuy v. Howes Leather Co., 352 U.S. 249 (1937) 14

Lupton v. Chase National Bank of City of New York, 89 F.Supp. 393 (D.C. Neb., 1950) 14

Lynne Carol Fashions, Inc. v. Cranston Print Works Co., Inc., No. 19,599 (3d cir., Jan. 17, 1972) 13

New Jersey v. New York, 345 U.S. 369 (1953) 24

Ohio v. Wyandotte Chemical Corp., 401 U.S. 493 (1971) 8, 9, 18

Oregon v. Mitchell, 400 U.S. 112 (1970) 6

Rachal v. Hill, 435 F.2d 59 (5th Cir., 1970), cert. denied 403 U.S. 904 (1971) 12, 13

United Mine Workers v. Gibbs, 383 U.S. 715, 721-729 (1966) 5

United States v. Addyston Pipe and Steel Co., 85 Fed. 271, 285 (CCA 6th, 1898) aff'd. 175 U.S. 211 (1899) 5

United States v. Automobile Manufacturers Ass'n, 307 F. Supp. 617 (C.D. Cal., 1969), aff'd. *sub nom. City of New York v. United States*, 397 U.S. 248 (1970) 22

United States v. DuPont & Co., 366 U.S. 316 (1961) 16

United States v. Grinnell Corp., 384 U.S. 563 (1966) 16

United States v. Singer Manufacturing Co., 374 U.S. 174 (1963) 6

United States v. U.S. Gypsum Co. 333 U.S. 364, 396 (1948) 6

Vane v. Lord Barnard, Court of Chancery, 1716, 2 Vernon 738 16

Statutes

	Page
Clayton Act, Section 16	3, 6, 7
28 U.S.C., §1292(b)	25
§1404	26
§1407	2
The Clean Air Act Amendments of 1970	17, 19

Textbooks

5A MOORE, FEDERAL PRACTICE, 2994 (2nd ed., 1971)	14
Chafee & Re, *Cases and Materials on Equity*, 823 (5th Ed., 1967)	16

Other Authority

Attorney General's Comm. to Study Antitrust Laws, 230-231 (1955)	2
Federal Rules of Civil Procedure, Rule 52(a)	14
Rule 53(e)(2)	13
Chief Justice Burger, *State of the Federal Judiciary*, 90 S.Ct. 2381, 2383 (1970)	10
4 Restatement of Torts, Note on Terminology, at 680-81 (1939)	16

IN THE

Supreme Court of the United States

October Term, 1971

STATE OF WASHINGTON, *et al.*,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Defendants.

PLAINTIFFS' MEMORANDUM ON CHOICE OF SUBSTANTIVE LAW AND BRIEF IN REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

Introductory Statement

The Supreme Court has directed all parties in this action to file simultaneous memoranda on the issue: Would federal or state law govern the substantive issues sought to be presented for decision in original actions such as this one?

The question of whether federal or state law is applicable was treated briefly in plaintiffs' supplemental memorandum of law dated February 12, 1971 (in respect to Count III, the nuisance count) and in the brief of sixteen states and the City of New York as *amici curiae* (in respect to Count I, the alleged Sherman Act violation). For reasons explained in Part I, *infra* at p. 4, the choice of law issue respecting Count III is now moot.

On December 24, 1971 defendants filed a supplemental memorandum in opposition (Def. Supp. Mem.) to plaintiffs' motion for leave to file complaint. Part II, beginning at p. 8, *infra*, replies to that supplemental memorandum

Pertinent recent developments in the multidistrict motor vehicle pollution cases, MDL No. 31, transferred to Judge Manuel Real, Central District of California at Los Angeles, pursuant to 28 U.S.C. § 1407 are called to this Court's attention in Part III, beginning at 20, *infra*.

ARGUMENT

PART I.

CHOICE OF SUBSTANTIVE LAW

1. Federal Law Governs the Substantive Issues in This Action.

The gravamen of plaintiffs' complaint is Count I, charging a federal antitrust violation. Plaintiff states allege a classic antitrust conspiracy to suppress technology and marketing of effective motor vehicle pollution control devices. See report of Attorney General's Comm. to Study Antitrust Laws, 230-231 (1955) and cases cited.

Specifically, these plaintiff states allege in their proposed complaint (Comp.) that beginning at least as early as 1953 and continuing until at least September 1969, the defendants combined and conspired among themselves and with other co-conspirators to suppress and retard research, development, manufacture and installation of effective motor vehicle air pollution control equipment (Comp. ¶ 16, p. 5).

The complaint alleges certain specific actions taken in concert and in furtherance of the alleged conspiracy including:

1. The restriction and suppression of pollution control technology (Comp. ¶ 17(a), 18(a), (b)).

2. Delayed installation of "positive crank case ventila-

tion, both inside and outside the state of California" (Comp. ¶ 17(c)(1) and (2)).

3. The restriction and suppression of publicity, which in fact includes a persistent pattern of alleged misrepresentations to governmental bodies and administrative agencies relating to research and development efforts concerning motor vehicle air pollution (Comp. ¶ 17(d)).

The conspiracy alleged and the specific acts in furtherance of the conspiracy describe violations of the Sherman Act.

This case arose directly out of the 1969 Justice Department civil complaint charging defendants with the same conspiracy alleged in plaintiffs' proposed complaint.

The proposed complaint also includes a count alleging common law conspiracy (Count II) and a count alleging nuisance (Count III), in addition to the antitrust violations. However, these counts were included *only* to supplement and support Count I.

Defendants had argued in the multidistrict proceedings that, even if plaintiffs in these actions could establish antitrust violations as alleged, the equitable relief sought was beyond that permitted by Section 16 of the Clayton Act.

Count II was added to authorize use of this Court's general equitable powers so that relief could be afforded in one case in the unlikely event defendants' narrow construction of Section 16 of the Clayton Act prevailed. The choice of law applicable to Count II, should Count II become relevant, is discussed below.

2. Plaintiffs Strike Count III.

Count III was included to give additional support to the Count I antitrust claim. While the wrong for which these states seek relief was a conspiracy in restraint of trade, plaintiff states recognized the possibility that the facts might also establish another actionable wrong, namely, the tort of nuisance. Before they had seen the evidence available to them through the multidistrict proceedings, plaintiffs were concerned that they might possibly fail to prove a conspiracy in restraint of trade, but, at the same time might establish another actionable wrong entitling them to similar relief. For that reason, Count III was included as a secondary claim.

Now, having had the opportunity to review documentary evidence available to them under a protective order in MDL Docket No. 31, plaintiffs are confident that the conspiracy alleged can be proved. Rather than encumber this case with an additional and broader nuisance claim, they prefer to simplify the issues in deference to the urgent need for speedy resolution and relief based only upon the antitrust claim. Accordingly, plaintiff states hereby strike Count III from their proposed complaint.

3. Count II Will Probably Not Be Reached. If It Is, It Is Controlled by State Common Law, and Is a Claim Pendent to Count I.

The principal equitable relief plaintiffs seek is a mandatory injunction requiring defendants, at their expense, to retrofit all pre-1968 cars with effective pollution control devices (Comp., Prayer ¶ 4). Defendants' argument, based on a narrow and untenable reading of § 16 of the Clayton Act, is both totally premature at this stage of the litigation,

and wrong. Accordingly, choice of law under Count II has only remote and contingent significance.

Moreover, it is an easy question. Count II is a classic pendent jurisdiction claim seeking relief under state law for the same acts alleged in Count I to be wrongful under the Sherman Act. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 721-729 (1966). See also defendants' Brief in Opposition at page 12.

The state law applicable is "the general doctrine of the common law that contracts restraining competition . . . are void." *United States v. Addyston Pipe and Steel Co.*, 85 Fed. 271, 285 (CCA 6th, 1898) aff'd. 175 U.S. 211 (1899). In his opinion, Judge Taft carefully reviewed the common law in at least 16 different states, as well as England and Canada, regarding contracts in restraint of trade, and concluded

> . . . that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade and tending to a monopoly. *United States v. Addyston Pipe and Steel Co., supra,* at 291.

Thus, inclusion of Count II in no way complicates this case. It raises no new or different facts; and it presents no difficult question on choice of law.

4. The Federal Law Questions Require Determination By This Court.

Contrary to defendants' assertion, this is not principally a fact case. To the extent there are factual questions, they will turn primarily upon documentary evidence. Judge

Real, who has supervised the multidistrict proceedings since their commencement in April 1970, and who attended a portion of the one deposition taken in the multidistrict actions to date, recently observed:

> "I saw the deposition of Mr. Caris and read it all or with that part of it, *it does boil down to a document case* because that is all that came out of Mr. Caris' deposition was basically reading documents." Transcript of Proceedings, Los Angeles, California, January 11, 1972, p. 8

Appellate review of factual findings has always been broader when those findings were not based upon oral testimony.[1] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948) (Oral testimony conflicting with contemporaneous documents); *Grove Laboratories v. Brewer & Co.*, 103 F.2d 175 (1st Cir. 1939) (depositions); *Bowles v. Carnegie-Illinois Steel Corp.*, 149 F.2d 545 (7th Cir. 1945) (affidavits). The essentially documentary nature of the evidence will greatly facilitate trial by this Court of such limited fact issues as this case presents.

This case will not, however, turn primarily upon disputed questions of fact but upon the resolution of important questions of federal law. Cf: *Oregon v. Mitchell*, 400 U.S. 112 (1970) (18 year old vote case).

Both here and in the multidistrict cases, including the interlocutory appeals to the Ninth Circuit, defendants have raised certain fundamental questions about the Sherman and Clayton Acts. The first question, presently *sub judice* in the Ninth Circuit on interlocutory appeal from an order of Judge Manuel Real denying defendants' motion to dis-

1. This same point disposes of defendants' reliance upon *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963) regarding the value of intermediate appellate review. (Defs. Supp. Memo, p. 13).

miss, is whether or not plaintiff states have standing to sue on behalf of their citizens for relief under the federal antitrust laws in the absence of a "commercial relationship" between the victim and the perpetrator of the alleged antitrust conspiracy.

The second question, which defendants have suggested here, is whether or not plaintiffs can legally obtain the injunctive relief for which they have prayed. Specifically, defendants challenge the power of a federal court under Section 16 of the Clayton Act to grant the retrofit relief sought by these plaintiffs and *amici*. As we shall show below, both of these questions are prematurely raised by defendants at this juncture.

Irrespective of that, however, these vital questions of federal law must ultimately reach and be resolved by this Court, whether it accepts original jurisdiction or permits the questions to reach this Court in the traditional appellate fashion.

PART II.

REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

5. *Georgia v. Pennsylvania R. Co., and Ohio v. Wyandotte Chemicals Corp.*, Support an Exercise of Original Jurisdiction in This Case. (Reply to Def. Supp. Mem. pp. 5-8)

In *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1949) the standards for exercising original jurisdiction in controversies between a state and citizens of another state were first announced as follows:

> The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice. *Georgia v. Chattanooga*, supra; *Massachusettts v. Missouri*, supra. 324 U.S. 464-465.

The availability of a more suitable alternative forum, namely the courts of Ohio, was clear in *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493 (1971). As this Court stated and indeed, as counsel for the State of Ohio admitted in oral argument:

> The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy, and they would decide it under the same common law of nuisance upon which our determination would have to rest. 401 U.S. at 500

However, there is no alternative forum more suited to trial of the present case.

Defendants urge that granting plaintiffs' motion would impose insuperable burdens on this Court and detract from its paramount role as the supreme federal appellate

court. Def. Supp. Mem. p. 39. Indeed, they charge plaintiff states with disregard for "this Court's other manifold responsibilties."

But, in fact, while defendants' approach might spare this Court some additional effort in the short run, at the same time, by delaying a final resolution of this matter, defendants' approach would actually impose far greater burdens on this Court and indeed on the entire federal judicial system. If original jurisdiction is not exercised, and if plaintiff states must pursue their remedies in the district courts, there could be as many as 23 separate district court trials with appellate review in all 10 circuits.[2]

As implicitly recognized by the Chief Justice in his two State of the Federal Judiciary addresses, the current role of this Court in the federal system is not limited to functioning as the supreme federal appellate court, but includes ultimate responsibility for maintaining and assuring overall efficiency and viability of the entire federal judicial system. Accordingly, weighing alternative available forums against this forum by standards of convenience, efficiency and justice, this Court must consider the effect of its choice upon the entire federal judicial system, not simply upon the workload of this Court. Precisely this point was made by Mr. Justice Harlan in *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 499, when he said: "Protecting this Court *per se* is at best a secondary consideration."

The present case is indeed unique in the history of federal court litigation. It alleges a nationwide conspiracy in restraint of trade, most susceptible of remedy by nation-

2. As discussed *infra* at 24, plaintiffs are attempting to expedite the multidistrict litigation, but there is no assurance those efforts will succeed.

wide, uniform equitable relief. While monetary damages may lie, and may be the only meaningful relief if trial is delayed, such damages are not an adequate or the most appropriate remedy. Plaintiffs seek clean air, not money. The scope of this problem results from the way automobiles have altered our society.

> In this 20th Century, wars, social upheaval, and the inventiveness of Man have altered individual lives and society. The automobile, for example, did more than change the courting habits of American youth—it paved the continent with concrete and black top; it created the most mobile society on earth with all its dislocations; it led people from rural areas to crowd the unprepared cities. Chief Justice Burger, *State of the Federal Judiciary*, 90 S.Ct. 2381, 2383 (1970).

If future cases combine a national wrong with a need for national injunctive relief as in this case, Congress may fashion a national forum alternative to the original jurisdiction of this Court. At this juncture, however, the original jurisdiction of this Court is the only "adequate machinery" available for meaningful determination of this dispute between thirty-four states and the citizens of another state. See *Georgia v. Pennsylvania R. Co.*, 324 U.S. at 450.

6. There Is No Right to a Jury Trial in This Case. (Reply to Def. Supp. Mem. p. 14)

Defendants express concern in their supplemental memorandum that a non-jury trial by this Court would have "powerful and perhaps controlling effect" upon subsequent jury trials of damage claims in related district court actions (Defs.' Supp. Mem., p. 15). Defendants attempt to rely on *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959)

and *Blonder-Tongue v. University Foundation,* 402 U.S. 313, 320-27 (1971).

Exercise of original jurisdiction by this Court would result in a single trial of the equitable relief cases brought by 37 of the 40 governmental plaintiffs. Left to be tried in appropriate district courts would only be a maximum of six cases.[3] These are, of course, different cases from those brought by plaintiffs and *amici* here.

Nobody in this case has any right to a jury trial. Similarly, where a plaintiff seeks damages, a jury trial right exists for either party. Yet, no defendant has a right to a jury in one plaintiff's equitable case simply because another plaintiff has a separate case seeking damages upon similar allegations. Nor can it be seriously argued that a defendant has a right to delay trial of the equitable case until after the separate damages case has been tried, especially where such delay may render relief in the equitable case meaningless.

Because separate cases by separate plaintiffs are involved here, the principles underlying such decisions as *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), relied on by defendants are wholly inapplicable.[4]

3. Plaintiffs in these cases are California; the City of Philadelphia, *et al.;* a cropfarmer class action entitled *Morgan;* a Chicago consumers class action entitled *Keane*; AMF Inc., a third party manufacturer; and Sturtz, a third party inventor. The *Morgan* class was approved by Judge Real and the *Keane* class was dismissed. The appropriateness of both these classes is *sub judice* in the 9th Circuit.

4. Thus, there is no occasion to consider whether in a single case separate trials first on equitable and then on legal counts would be warranted under the exceptional circumstances of this litigation. *Beacon Theatres* notes that there may be "imperative circumstances" where a prior determination of an equitable claim may be permissible in the trial court's discretion even though that would be binding in a subsequent jury trial on another claim in the same case. 359 U.S. at 510-511; see also *Dairy Queen Inc. v. Wood,* 369 U.S. 469, 472-473, 479 n.20

7. Collateral Estoppel Will Not Impair the Right to Jury Trial. (Reply to Def. Supp. Mem. p. 14)

A decree entered in this non-jury equitable case would have no res judicata or collateral estoppel effect in subsequent jury trials. This precise situation was faced in *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), where plaintiff in an action before a jury seeking damages under federal securities laws asserted that defendants were collaterally estopped by the judgment in a prior non-jury action brought by the Securities and Exchange Commission respecting the same subject matter.

Defendants first contended that plaintiff could not rely upon collateral estoppel, since plaintiff was a stranger to the S.E.C. injunction action. Secondly, defendants contended that collateral estoppel could not be invoked to deprive them of a jury trial on the liability issue.

The court rejected the first contention, following the modern view that lack of "mutuality" does not bar application of res judicata and collateral estoppel. But it accepted the second proposition, holding that, in light of *Beacon Theatres*, the order of trial could not deprive defendants of their right to a jury on the damage claims against them. The court reasoned (435 F.2d at 64) that:

> had Hill [the plaintiff] been a party plaintiff in the S.E.C. injunction action and there presented his claim for damages, the appellants would have received a jury trial on the issue of liability. It hardly makes sense

---

(1962). The desperate need for a retrofit remedy to diminish continuing air pollution pending a necessarily more distant trial on damages would, we believe, be an "imperative circumstance" calling for a prior equitable trial even if separate trials on legal and equitable claims brought by the same plaintiffs were involved here.

> that Hill can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case. . . .

Rachal was followed in *Lynne Carol Fashions, Inc. v. Cranston Print Works Co., Inc.*, No. 19,599 (3d Cir., Jan. 17, 1972) and *Cannon v. Texas Gulf Sulphur Co.*, 323 F. Supp. 990 (S.D.N.Y. 1971), and we are aware of no conflicting authority.

8. This Court Can Handle This Case Efficiently and Expeditiously With a Special Master. (Reply to Def. Supp. Mem. pp. 13-14)

The Constitution, statutes, court rules, and previous decisions give this Court wide latitude and discretion over the manner in which it can function appropriately as a trial court. If this Court exercises original jurisdiction here, a special master should be appointed to preside over the pretrial and trial proceedings.

While this Court could give broad powers to such a special master without abdicating its judicial duties, guidelines for use of masters by district courts could be followed here. For example, Federal Rule of Civil Procedure 53(e)(2) states: "In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous."

In discussing the scope of review of a master's findings, Professor Moore states:

> Since mere objections [to the master's report] *would compel the court to review the whole case, and thus would defeat the very purpose of reference*, such

> vague and general objections should be overruled. 5A MOORE, FEDERAL PRACTICE 2994 (2nd ed. 1971). (Emphasis added)

In fact, the clearly erroneous rule stated in Rule 53(e)(2) has the same meaning as in Rule 52(a) relating to appellate review of district court findings of fact. See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 689 (1946); *Dyker Bldg. Co. v. United States*, 182 F.2d 85 (D.C. Cir. 1950); *Lupton v. Chase National Bank of City of New York*, 89 F. Supp. 393 (D.C. Neb. 1950).

Thus, traditional standards for using a special master provide an excellent framework whereby this Court can expedite proceedings. The taking of evidence and determination of factual disputes can be done by the master and reviewed by this Court on the same basis that an appellate court normally reviews factual findings by a trial judge, and on the same basis that this Court normally reviews findings of fact by lower courts on direct appeals. Meanwhile, this Court would decide all critical motions and grant or deny the ultimate relief sought. Such an arrangement would eliminate inconsistent and conflicting results and would expedite the final determination of this litigation by avoiding the interlocutory appeals and similar delaying tactics prevalent in these cases from their inception.

LaBuy v. Howes Leather Co., 352 U.S. 249 (1937), relied upon by defendants, supports rather than detracts from plaintiffs' proposal for a master in the present case. In *LaBuy*, this Court held that a district judge, clearly competent to handle an antitrust case, abused his judicial powers by delegating the trial to a practicing lawyer who was not an experienced trial judge, particularly where the

judge himself was already familiar with the case because of extensive pre-trial proceedings. The Court observed that appointment of a busy lawyer as master usually results in a delayed decision, and emphasized that complex cases require trial judges rather than *ad hoc* inexperienced substitutes.

For this reason and for the reasons stated in Part III, plaintiffs believe that this Court should select as master an experienced trial judge, already familiar with the issues because of extensive pre-trial proceedings, and whose efforts will contribute to expedition, not delay, of the final decision. Plaintiffs previously suggested, and now urge that Judge Manuel Real be appointed special master by this Court for the fair, efficient and expeditious processing this case requires.

9. The Equitable Relief Sought by Plaintiff States Is the Most Appropriate Remedy for the Continuing Loss or Damage Caused by Defendants' Alleged Sherman Act Violations. The Clean Air Amendments of 1970 in No Way Detract From the Traditional Powers of an Equity Court Sitting in an Antitrust Case. (Reply to Def. Supp. Mem. pp. 15-33)

Defendants' argument that this case involves "political" considerations (see Def. Supp. Memo *e.g.*, p. 8, heading p. 9, and p. 24) requiring "policy decisions" (*e.g.*, pp. 10, 21) completely and deliberately misapprehends the nature of this lawsuit.

The principal relief sought is a mandatory injunction requiring defendants to cause to be installed at their expense effective antipollution control equipment on all pre-1968 motor vehicles in the United States (Comp. p. 13 Prayer, ¶4). The "disputed question of the power of any

court to grant such novel equitable relief" (Def. Supp. Mem. p. 10) is no less a question appropriate for judicial decision than is the appropriateness of a remedy in any other suit where Section 16 of the Clayton Act is invoked or in which a court of equity is asked to remedy a breach of law. The power of a federal court sitting in equity has been applied numerous times to fashion decrees uniquely designed to remedy wrongs caused by antitrust defendants.

Thus in *United States v. DuPont & Co.*, 366 U.S. 316 (1961), this Court ordered complete divestiture of all General Motors stock held by DuPont, despite adverse tax and market consequences. At 366 U.S. 323-34 it said:

> The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. . . . If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause.

And see *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) where defendants, who leased equipment, were directed to sell on nondiscrimnatory terms, so that the product market would be opened to competition.

Moreover, retrofit is precisely the kind of "reparative" mandatory injunction equity courts have historically granted. See *Vane v. Lord Barnard*, Court of Chancery, 1716 2 Vernon 738, also reported in Prec. Ch. 454, Gilb. Eq. 127, and 2 Salk. 161, abstracted in CHAFEE & RE, CASES AND MATERIALS ON EQUITY 823 (5th Ed., 1967); *Kennard v. Cory Brothers & Co.* [1922] L.R. 1 Ch. 265 (C.A.); 4 Restatement of Torts, Note on Terminology, at 680-81 (1939).

Defendants' arguments that "the national failure to appreciate the environmental implications of vehicle and other emissions at an early date is plainly a social and political one" is irrelevant in the extreme when plaintiff states are charging these defendants with long-standing violations of the Sherman Act and fraudulent concealment of those violations. (Comp. ¶19, p. 9)

Defendants rely heavily on the Clean Air Act Amendments of 1970 to argue that the equitable remedy sought by plaintiffs would amount to judicial usurpation of congressional responsibility. In fact, however, the Clean Air Act amendments forcefully dramatize the sharp contrast between the type of political decision with which Congress was faced and to which defendants allude, and the *judicial remedy* which plaintiff states seek here. As is true with most legislation, the 1970 act was a result of political compromise. It was not based on a judicial finding that the automobile manufacturers were guilty of any wrongdoing. By contrast, the duty of this Court or any court is to decide whether a particular remedy is necessary to redress an injury proved and, if so, to consider whether it is appropriate, given the nature and seriousness of the violation. In short, contrary to defendants' assertion, "case by case decisions of the judiciary" (Def. Supp. Mem., p. 21) are completely appropriate, indeed, essential, to remedy past violations of law.

As we have pointed out previously, (Pls.' Reply Br., p. 15; and see *Amici* brief, p. 15, n. 6), the federal law establishes standards for new cars. The remedy which plaintiff states seek deals with pre-1968 cars, namely, those cars manufactured and sold during the period of the

alleged antitrust conspiracy. Thus, plaintiffs are not attempting to "replace, modify or accelerate the imposition of the standards mandated by" the 1970 act (Def. Supp. Mem., p. 20). We only seek to have defendants produce the cars which they "would have produced" but for the illegal conspiracy. The discussion at pages 22 through 25 of defendants' supplemental memorandum on sources of air pollution and the responsibility of other polluters is totally out of place in this case. It is, however, indicative of the whole thrust of defendants' argument. Defendants would persuade this Court that, like *Ohio v. Wyandotte, supra,* this case represents an effort by the states to fight air pollution. Indeed, in their supplemental brief they argue this case as if it were another version of *Ohio v. Wyandotte.* Yet it is unmistakably clear from the complaint and our arguments to date, that this is an antitrust case. Liability depends entirely on antitrust principles and the relief sought depends entirely on equitable powers employed to mold antitrust remedies. True, the subject matter of the violation is motor vehicle air pollution. But this case is an air pollution case only in the sense that another major anti-trust case, *Associated Press v. United States,* 326 U.S. 1 (1945), was a newspaper case, as the defendants in that case, invoking the First Amendment, unsuccessfully argued.

Defendants argue as well that this case deals with matters of "an unusually complex and technical nature" (Def. Supp. Mem., p. 11) and "with the frontiers of an arcane and still imperfectly understood technology" (Def. Supp. Mem., p. 11). But plaintiffs are prepared to prove that time and again throughout the fifteen-year history of the alleged conspiracy, defendants, who controlled most of the

technology in the field, misled and misrepresented the facts to various state, federal and local government agencies. Until this evidence can be made public, it will be impossible to know whether defendants are now accurately representing the facts to this Court or any court or even accurately represented the facts to Congress when it enacted the Clean Air Amendments of 1970.

10. In Any Event, Defendants' Argument Regarding Relief Is Totally Premature. (Reply to Def. Supp. Mem. pp. 15-33)

In support of their motion to dismiss in MDL Docket No. 31, defendants made the same argument respecting equitable relief sought which they make here. Judge Real disposed of that argument summarily, stating, *inter alia*:

> Plaintiffs may fail in their proof, but until then they should be given the benefit of employing "any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946); *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). Memo Order (Re Motion to Dismiss) p.3.

> It may well be that a trial judge, after hearing the evidence may determine that the grant of an injunction which parallels the relief of the consent decree in action 69-75-JWC is unwarranted. But pre-judging at this stage of the litigation, that plaintiffs may not be able to present some peculiar need for further injunctive relief is not the function of this Court. The prayers for relief are within the jurisdiction of this Court grant given the proof of facts alleged. Whether it is necessary or desirable is for the trial judge or development of these cases to where they may be subject to disposition without trial. Memo Order (Re Motion to Dismiss) p.4.

This reasoning applies equally here.

PART III.

RECENT DEVELOPMENTS

11. Recent Developments Confirm the Need for Original Jurisdiction to be Exercised.

This original action is integrally related to the actions pending before Judge Manuel Real in MDL No. 31. From the beginning, the position of plaintiff states in this action has consistently been to seek *one* trial of the equitable issues, and *one* nationwide injunction in the *speediest* possible manner. The goals of one speedy trial and one nationwide injunction were and are the reasons for urging this Court to exercise its original jurisdiction. (See Pl. Br. in Supp. of Motion, pp. 19 and 22; Pl. Supp. Mem., p. 8; Reply Br., p. 14.)

The remaining governmental plaintiffs equally desire a speedy unified trial on the equitable issues and, with the exception of California and Philadelphia, have agreed to withdraw their claims for damages in the district court proceedings, if they can obtain that result. The positions of California and Philadelphia are not final.

Conversely, defendants have been engaged from the outset in a program of proliferation and protraction. They oppose unified trial of the antitrust issues both here (Br. in Opp. pp. 19-20; Def. Supp. Mem., p. 35) and in MDL No. 31.

Defendants are equally resistant to an early trial. In their Supplemental Memorandum (page 11) the threat of lengthy proceedings is scarcely veiled. After observing that "major antitrust cases usually require *years* of pretrial and trial proceedings," they complain about how the present case is allegedly even more complex and diffi-

cult. The implication left about how long this case will take is clear.

It becomes apparent, however, why these prophecies of interminable litigation are cultivated. After criticizing retrofit for pre-1968 cars as an unfeasible remedy, defendants observe (at page 31) that uncontrolled used vehicles on the road are a "constantly shrinking number." It is their goal to delay resolution of the issues raised by these cases until the effectiveness of retrofit and, consequently, the expense to defendants if plaintiffs obtain the equitable relief sought will have dissipated through the passage of time.

Defendants are aware that an effective retrofit is available. A statement by Chrysler Corporation, packaged with a retrofit device it is now marketing, states:

> Combined with an engine tuneup, the device cuts emissions on older vehicles by an average of 50% in hydrocarbon, 50% in carbon monoxide, and about 30% in oxides of nitrogen.

Similarly, General Motors advertises a "low-cost emission control system" for pre-1967 cars, which, together with an engine tune-up, will reduce emissions by 50 percent. Washington Post, April, 1970.

If a speedy trial on the equitable issues is denied plaintiff states, such devices will probably never be installed at defendants' expense on a nation-wide basis, and the injury caused by defendants' conspiracy will go unremedied. Such a result will be particularly unfortunate when defendants themselves have conceded that "[i]f every car produced before 1969 had [available retrofit devices], our air would be as pure as it was 30 years ago." (John DeLorean, Vice President of General Motors in charge of Chevrolet Division, Look Magazine, p. 57, August 25, 1970).

Recent developments in MDL No. 31 show that, if certain legal hurdles are cleared, a speedy trial, specifically, a trial starting in December 1972, on the equitable issues only, can be achieved.

To show the significance of these recent developments in MDL No. 31 and their direct relationship to the motion of plaintiff states for leave to file their proposed complaint here as an original action, a summary recapitulation of the Motor Vehicle Air Pollution Antitrust litigation is necessary.

In early 1969 the Justice Department filed a civil action charging defendants with conspiracy to eliminate competition in research, development, manufacture and installation of motor vehicle air pollution control equipment. That case was settled by a consent decree which simply forbade continuance of the alleged illegal combination, despite strenuous objections from many major public bodies that the consent decree relief was inadequate. *United States v. Automobile Manufacturers Ass'n.*, 307 F. Supp. 617 (C.D. Cal. 1969), affd. sub. nom. *City of New York v. United States*, 397 U.S. 248 (1970).

Following entry of that decree, a number of states and other governmental entities filed antitrust suits similar to Count I of the present case in federal district courts throughout the United States.

The actions filed in the district courts by the governmental entities are suits for equitable relief and treble damages. The state plaintiffs in the district court actions have sued both in their capacity as *parens patriae* and pursuant to Rule 23 of the Federal Rules of Civil Procedure as representatives of a class consisting of all political subdivisions within their state. These actions were all transferred

to the United States District Court for the Central District of California, Judge Manuel Real, as MDL No. 31, pursuant to 28 U.S.C. §1407.

The present action was filed in this Court by fifteen states on August 5, 1970. Three additional states were subsequently granted leave to join as plaintiffs. See 91 S. Ct. 2272. This action was brought by plaintiffs in their capacity as *parens patriae* on behalf of the citizens of their respective states for equitable relief only. The proposed complaint does not claim to be a class action. It does not seek monetary damages. The sole purpose of this action was and is to obtain equitable relief in the form of a mandatory (reparative) injunction for the continuing "loss or damage" inflicted upon the citizens and property of the plaintiff states by defendants' antitrust conspiracy.

While plaintiffs' motion was pending it became evident that applicable statutes of limitation might run. To foreclose that risk, in March 1971 plaintiff states herein filed "standby" district court actions. See telegram to Clerk of Supreme Court dated April 15, 1971, Appendix A. Eleven of these states filed separate antitrust actions in their own districts. The remaining seven plus Nevada filed one consolidated action in the Central District of California.

These "standby" actions were added to all the other district court actions previously transferred to Judge Real, as MDL Docket No. 31. These MDL actions include complaints filed by a total of thirty-four states and six other governmental entities in twenty-three federal districts in all ten circuits.

In August 1971 sixteen states and the City of New York which had all initially filed district court actions urged

this Court, as *amici curiae*, to assume original jurisdiction of this case and stated their intention to seek leave to join this action as plaintiffs if that jurisdiction is exercised.[5]

On January 24, 1972, all of the multi-district plaintiffs, including plaintiffs herein, submitted to Judge Real a proposed program of further pretrial and trial proceedings in which they stated that the plaintiffs in all but two of the governmental cases would drop all claims for damages if a consolidated trial before Judge Real on the remaining equitable claims would be scheduled not later than December 1972. Defendants uniformly opposed this program.

Plaintiffs in the present case informed Judge Real that their need for an exercise of original jurisdiction by the Supreme Court would no longer exist if a firm and preservable consolidated trial date before Judge Real could be set for December 1972. They further stated:

> If, however, this court cannot assure a preservable 1972 trial date because of issues *sub judice* in the Ninth Circuit, other possible interlocutory appeals or petitions for certiorari which defendants might pursue, or any other reason, then these plaintiffs, to accomplish their original purpose of a speedy trial on the equitable issues, will continue to pursue actively their original action before the Supreme Court. That pursuit will obviously not be designed to preclude further actions by this court, but rather, as we have earlier suggested to the Supreme Court, to expedite resolution of both this multidistrict litigation and the original action. Toward that end, we support a December 1972 trial date by this court in any event.

One other aspect of this litigation is crucial in determin-

5. This Court has previously indicated that intervention of non-state plaintiffs would be permitted in an original action under appropriate circumstances. See *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

ing whether this Court should exercise its original jurisdiction. In MDL No. 31, defendants moved to dismiss the governmental complaints based upon defendants' interpretations of the antitrust laws set forth at 6-7, *supra*. Following denial of these motions, six cases were certified for appeal pursuant to 28 U.S.C. §1292(b). Oral argument in the Ninth Circuit occurred on January 13, 1972, where the issues are now *sub judice*.

A hearing was held before Judge Real on February 17, 1972, (five days before the filing of this brief) on the question of whether plaintiffs' proposed program for expedited pretrial proceedings and a December 1972 trial date should be adopted.

At the conclusion of that hearing, Judge Real adopted the following program:[6]

1. He ruled that "at least until the order of the Court of Appeals comes down" he would limit discovery and proceed with the schedule basically as proposed by plaintiffs on the equity issues only at this time.[7]

2. He set a further pre-trial hearing for March 7, 1972 for consideration of proposed notices to the classes that have been allowed in MDL No. 31, indicating plaintiffs' intention to withdraw their damage claims, contingent upon setting a December 1972 trial date and giving class members a right to opt out of that decision.

3. He denied the motion of plaintiffs to sever [or with-

6. Pertinent portions of the transcript of that hearing before Judge Real held at Los Angeles, California on Thursday, February 17, 1972, are attached as Appendix B.

7. Plaintiffs' proposed pre-trial schedule calls for completion of first wave discovery by June 30, 1972; and commencement of second wave discovery on August 15, 1972; and commencement of trial on December 4, 1972.

draw] their damages claims, without prejudice to renew after a hearing upon the proposed class notices, and a determination of the class action.

4. He deferred until after resolution of the class questions a proposal to issue an order to show cause why the actions filed in other districts should not be transferred to the Central District of California under 28 U.S.C. §1404.

Thus, in light of Judge Real's ruling on February 17, 1972, the case is proceeding with a discovery program tentatively geared to a target trial date in December 1972 on the equitable claims only.

There are, however, at least four roadblocks which must be cleared before the December trial date becomes a reality. They are: (1) the requirement of notice to the governmental classes and responses by the class members; (2) defendants' vigorous resistance to any transfer of all equity cases to the Central District of California under 28 U.S.C. §1404 (Transcript of Proceedings, February 17, 1972, p. 51.); (3) the possibility of certiorari to this Court and a request for stay of the trial date by defendants if they lose their interlocutory appeal now *sub judice* in the Ninth Circuit; (4) the possibility that defendants will seek interlocutory appeal or mandamus, coupled with a stay, if Judge Real transfers pending cases to his district under 28 U.S.C. §1404.

Moreover, even if a December 1972 trial is obtained before Judge Real, but not under the original jurisdiction of this Court, the possibility of protracted appeals could delay relief at least an additional year.

CONCLUSION

The reason all governmental plaintiffs conditioned their decision to withdraw damages claims upon a speedy equitable trial is crucial. This conditional withdrawal of damages is not, as defendants argue, an effort to bargain with the trial court. Rather, it represents a difficult but realistic decision about the most effective remedy for the wrong committed by defendants. This decision was inextricably tied to the realities of automotive air pollution.

As stated by the Secretary of Health, Education and Welfare in his March 1970 report to Congress in compliance with Public Law 90-148 (The Air Quality Act of 1967), atmospheric changes caused by pollution are occurring,

> . . . at least in part, because the planetary atmosphere in toto is a closed system, and the natural atmospheric cleansing mechanisms are incapable of dealing with the great quantity of contaminants emitted. This is in contrast to a regional environment, where polluted masses of air frequently are swept away by the free movement of weather systems. Report, p. 73.

Defendants estimate that 50 million pre-1968 cars now on the road would be subject to retrofit if plaintiffs obtain the relief they seek. Approximately 8 million of these pre-1968 cars leave the road each year and that rate may accelerate in the future. Thus, irreparable harm to the atmosphere and to health not only continues, but the "res" of the equitable claims is rapidly disappearing while the harm it caused remains in the air indefinitely.

If equitable relief can be obtained during 1973, then the equitable remedy sought will be effective, invoked in sufficient time to reduce substantially or eliminate air

pollution from pre-1968 vehicles. However, if defendants succeed in delaying a trial, the relative value of retrofit will be diminished. And at some point, as more and more pre-1968 cars leave the road, money damages for past injuries will be the only available remedy. If that occurs, numerous jury trials in many district courts and appeals to this Court through a number of circuits will probably result.

This *parens patriae* action for equitable relief only, presents none of the obstacles raised by defendants in MDL 31. There are no problems of class notification and no problems of transfer by a §1407 transferee judge to himself under 28 U.S.C. §1404.[8] The other state plaintiffs have stated that they would intervene in this action if original jurisdiction is exercised. By exercising that jurisdiction and appointing Judge Real master with instructions to proceed with trial as expeditiously as possible, this Court can eliminate the possibility of protracted jury trials, difficult legal and factual questions relating to measuring and allocating money damages, diverse appeals, and most importantly, this Court can preserve the possibility of the one remedy most fitted to the wrong charged.

Respectfully submitted,

Dated February 22, 1972.

STATE OF WASHINGTON
SLADE GORTON, Attorney General

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8. Judge Real, apparently seeking a way to avoid these problems, suggested to plaintiffs' counsel that plaintiffs consider filing new cases in the Central District of California as *parens patriae* suits for equitable relief only. Unfortunately, as recognized by plaintiffs' counsel, this "solution" would raise serious, probably fatal, statute of limitations questions. (Transcript of Proceedings, p. 181)

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APPENDIX A

Telegram Dated April 15, 1971

Honorable E. Robert Seaver, Clerk
Supreme Court of the United States
Washington, D. C. 20543

Dear Sir:

Re: State of Washington, et al., Plaintiffs,
v. General Motors Corporation, et al.,
Defendants, O.T. 1970, No. 45 Original

We did not receive the April 7, 1971 letter of Howard P. Willens, attorney for defendant Automobile Manufacturers Association, Inc., in the above entitled matter until April 14, 1971, it having been mailed with his letter to the Court dated April 12, 1971 and postmarked in Washington, D. C. on April 12. We respectfully request that the facts stated in this telegram be called to the attention of the Court at the same time that you present the facts stated in Mr. Willens' letters.

Fifteen of the seventeen actions to which Mr. Willens refers were filed in various federal district courts by the states which are plaintiffs in the above entitled original action during the weeks of March 8 and March 15, 1971. These actions were all filed as "standby" actions solely for the purpose of protecting the rights of said states against any argument that the one year limitations period provided by 15 U.S.C. § 16(b) had expired while the Supreme Court was considering the states' motion for leave to file a complaint in original action No. 45.

While we are of the opinion that the pendency of plaintiffs' motion for leave to file the complaint would toll the

running of the pertinent statute of limitations and while we further believe that our arguments in favor of the Court's exercising its original jurisdiction are sound, in the absence of a case precisely on point in respect to the statute of limitations question, we concluded that the substantive issues presented by this litigation are too important to take any risk, no matter how minimal, that a statute of limitations argument could be urged by the defendants if this Court does not exercise its original jurisdiction.

We further request that you call to the attention of the Court the fact that the cases filed by the seventeen plaintiff states as "standby" actions have been filed in twelve different federal districts. While, as counsel for the defendant Automobile Manufacturers Association, Inc. points out, each of these cases is in the process of being transferred, pursuant to Section 1407 of the Judicial Code, to the Central District of California for pretrial proceedings, the eleven cases filed in districts other than the Central District of California will, pursuant to Section 1407, all be returned to their original districts for trial. Thus, if the Supreme Court refuses to exercise its original jurisdiction in the above entitled case the burden on the total federal judicial system of multiple trials referred to at pages 4-8 of Plaintiffs' Reply Brief In Support Of Motion For Leave To File Complaint are even more extensive than was the case when that reply brief was filed.

Furthermore, as pointed out in Plaintiffs' Reply Brief, pages 8-10, it is by no means clear that the District Court for the Central District of California would exercise pendent jurisdiction of Count III, the nuisance count.

On behalf of the plaintiff states in the above entitled case we request that the Court be informed that all plaintiff states reaffirm and renew their motion for leave to file complaint as an original action in the above entitled matter. If the Court seeks further explanation of the filing of the "standby" actions, we request the opportunity to file a brief or an extended statement of reasons.

Copies of this telegram are being sent by mail to all defense counsel and to co-counsel for Plaintiff States.

Fredric C. Tausend
Special Assistant Attorney General
State of Washington
One of the attorneys for Plaintiff States
in Original Action No. 45

APPENDIX B

Transcript of Proceedings, February 17, 1972

"THE COURT: All right, 2:00 P.M. on March 6, 1972 for consideration of notice to the classes that have been allowed by this Court thus far so that I have that in mind, and that is to be submitted by each of the plaintiff representatives on the class which they represent, the kind of notice that would indicate that there is the proposed dismissal. General notice of the class, why, I think we can get that done at the same time and not waste a notice. General notice of the class, the right to opt out and the question that there has been presented to the Court a situation in which damage actions are proposed to be dismissed upon the determination of a trial date no later than December 4, 1972, or whatever that date is—that kind of a date. So that we have in mind what we are talking about in terms of the class.

The motion to sever, so the record will be clear, is denied at this time without prejudice to the plaintiffs after the determination of the class action and hearing upon the proposal of the class on the notice. . . .

"THE COURT: No. The proposed notice should indicate that the hearing upon that notice in terms of the declaration of the class opting out will be at a certain time and for the dismissal of the damage actions upon the condition that a trial date be set.

"MR. SHAPIRO: And I assume that the trial date will be December 4, as we indicated?

"THE COURT: At least that indication can be put in the notice. Maybe at that time there may be some modification of that, but we can decide that before the notices go out. . . .

"THE COURT: I propose in any circumstance, Mr. Shapiro, at least until the order of the court of appeals comes down, to at least limit the discovery and proceed with the schedule basically as proposed by the plaintiffs on the equity issue only at this time.

"MR. SHAPIRO: All right, your Honor. The only thing I was concerned about, however, was the order to show cause with regard to transferring the cases here. That is the only other remaining thing that has not been touched on.

"THE COURT: Okay. The defendants have raised a question. As long as you are going to injunctive relief, Mr. Shapiro, you might think about the fact that you can file the cases in this district without any problem.

"MR. SHAPIRO: My problem is this. I may have—may have—this is my problem—I may have a very serious problem with regard to that with regard to the question of the limitations. How do I stop a case and start it all over again? That would be a perfect solution.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
FEB 22 1972
E. ROBERT SEAVER, CLERK

STATE OF WASHINGTON, ET AL.,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

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INDEX

	Page
A. Source of Law	2
Count I	2
Count II	3
Count III	4
B. Availability of Alternative Forums	11

TABLE OF AUTHORITIES

Cases:

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940)	4
Arkansas v. *Texas*, 346 U.S. 368 (1953)	6
Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 (1964)	6, 7, 9
Bank of America v. *Parnell*, 352 U.S. 29 (1956)	6
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943)	6, 8
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938)	5, 7
Georgia v. *Tennessee Copper Co.*, 206 U.S. 230 (1907)	5, 7
Hanna v. *Plumer*, 380 U.S. 460 (1965)	8
Hinderlider v. *La Plata River Co.*, 304 U.S. 92 (1938)	7, 9
Ivy Broadcasting Co. v. *American Telephone & Telegraph Co.*, 391 F. 2d 486 (2d Cir. 1968)	14
J. I. Case Co. v. *Borak*, 377 U.S. 426 (1964)	13
Klaxon Co. v. *Stentor Mfg. Co.*, 313 U.S. 487 (1941)	8
Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971)	6, 9, 10, 12
Parker v. *Brown*, 317 U.S. 341 (1943)	3
Romero v. *International Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (opinion of Brennan, J.)	14
Rosado v. *Wyman*, 397 U.S. 397 (1970)	14
Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963)	3
Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957)	8
Texas v. *New Jersey*, 379 U.S. 674 (1965)	6

	Page
Texas v. *Pankey*, 441 F. 2d 236 (10th Cir. 1971)	10, 14
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966)	12, 13
United States v. *Brosnan*, 363 U.S. 237 (1960)	8
United States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945)	4
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947)	8
United States v. *Yazell*, 382 U.S. 341 (1966)	6
Wallis v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966)	8
West Virginia ex rel. Dyer v. *Sims*, 341 U.S. 22 (1951)	7
Wheeldin v. *Wheeler*, 373 U.S. 647 (1963)	7, 8

Statutes:

Act of October 20, 1965, Public Law No. 89-272, 79 Stat. 992	11
United States Code, Title 15, § 1	3
United States Code, Title 15, § 26	2
United States Code, Title 28, § 1331	3, 10, 13, 14
United States Code, Title 28, § 1652	5
United States Code, Title 42, § 1857 *et seq.*	4, 10, 11

Miscellaneous:

Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954)	5
Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957)	6
Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512 (1969)	9
S. Rep. No. 403, 90th Cong., 1st Sess. (1967)	11
S. Rep. No. 91-1196, 91st Cong., 2d Sess. (1970)	11
Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954)	6
C. Wright, Law of Federal Courts § 60 (2d ed. 1970)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 45 Original

STATE OF WASHINGTON, ET AL.,
Plaintiffs,

v.

GENERAL MOTORS CORPORATION, ET AL.,
Defendants.

DEFENDANTS' MEMORANDUM ON SOURCE OF LAW

On January 18, 1972, this Court by telegram directed the parties in Nos. 45, 49 and 50 Original to file memoranda on the following issue:

> "Would federal or state law govern the substantive issue sought to be presented for decision in original actions such as this one?"

This memorandum is submitted in answer on behalf of defendants.[1]

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[1] The parties and *amici* in this proposed action have previously filed a number of briefs supporting or opposing filing of the complaint. On August 5, 1970, plaintiffs filed their Motion for Leave to File Complaint and Brief in Support ("Br. In Supp."). Defendants' Brief in Opposition ("Br. In Opp.") was filed on October 6, 1970. Plaintiffs thereafter filed a Reply Brief ("Reply Br.") on November 2, 1970, and a Supplemental Memorandum of Law ("Supp. Mem. of Law") on February 12, 1971. On August 31, 1971, an *amicus* brief was filed by sixteen States and the City of New

Plaintiffs' proposed complaint in this Court consists of three counts, alleging a violation of the federal antitrust laws (Count I), a "common law" conspiracy to restrain trade (Count II), and creation or maintenance of a public nuisance (Count III). Plaintiffs have consistently urged that Counts I and II present federal claims, and in their Supplemental Memorandum of Law (at 3-5) apparently contend that Count III does so as well. As our earlier briefs herein have indicated, the antitrust claim stated in Count I is governed by federal law, but Counts II and III—which we believe to be merely make-weight attempts to induce the Court to accept jurisdiction—are necessarily governed by state law. Regardless of the source of law applicable to Counts II and III, however, defendants submit that lower federal and state courts are available as forums to try these claims, and consequently this Court should decline to accept original jurisdiction over them.

In the first part of this memorandum we develop more fully our view of the source of law governing each of the counts of plaintiffs' complaint. In the second part we examine the bearing of the source of law question on the availability of lower federal and state court forums and the issue as to whether this Court should accept jurisdiction in this case.

A. Source of Law

Count I

Plaintiffs allege in their complaint that Count I is brought under Section 16 of the Clayton Act, 15 U.S.C. § 26, to restrain the defendants from violating Section 1

York. On December 23, 1971, defendants filed a Supplemental Memorandum in Opposition ("Supp. Mem."). Although none of these briefs was directed principally to the question of source of law, both plaintiffs and defendants have discussed that question previously, and reference to these prior discussions will be made in this memorandum where appropriate.

of the Sherman Act, 15 U.S.C. § 1 and to obtain certain mandatory injunctive relief. Complaint, Count I, para. 2. The claim is clearly a federal one.[2]

Count II

According to plaintiffs, Count II of their proposed complaint alleging a "common law conspiracy" was

> "brought under this Court's general equitable powers granted by Article III, Section 2, of the United States Constitution, independent of the Sherman and Clayton Acts, to eliminate and remedy conspiracies in restraint of trade . . . ." Complaint, Count II, para. 2.

Plaintiffs evidently attempt in Count II to state a federal common law claim cognizable in the federal courts.[3] Count II apparently invokes a body of judge-made law of trade restraints, totally separate from the Sherman and Clayton Acts and establishing both primary and remedial rights and duties. But if such a body of nonstatutory antitrust law exists at all, it is clearly not federal law.

When Congress enacted the Sherman Act in 1890 and condemned "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade," 15 U.S.C. § 1, it "left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'"

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[2] Although federal law governs Count I, defendants believe that numerous questions involving the effect of various state emissions control laws and regulatory actions will be raised both in determining whether defendants' cooperative program violated the antitrust laws and in considering whether or what equitable relief can appropriately be granted. *Cf. Parker* v. *Brown*, 317 U.S. 341 (1943); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

[3] The two virtually identical district court complaints filed on behalf of eight of the plaintiffs here allege that the jurisdictional basis of this claim is 28 U.S.C. § 1331. See Defendants' Supp. Mem., p. 34 n.44.

United States v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940). From that point on, judicial development of the federal law of trade restraints has necessarily been a matter of statutory interpretation, not of common law. Any common law of conspiracy in restraint of trade that is "independent of the Sherman and Clayton Acts" must therefore be state law. As we will now show, the general presumption against federal common law reinforces this conclusion.

Count III

In Count III of their complaint, captioned "Public Nuisance," plaintiffs allege that emissions from motor vehicles manufactured by defendants "cause severe damage to the flora and fauna of Plaintiff States" (Complaint, Count III, para. 9), and that the manufacture and sale of motor vehicles "as presently engineered and designed . . . constitute a public nuisance contrary to the public policy of the Plaintiff States, as well as the federal government."[4] Plaintiffs do not allege in Count III that defendants have violated the provisions of any federal law or regulation, and in their briefs they urge that "Count III does not involve a federal question for purposes of giving jurisdiction to any federal district court . . . ." Plaintiffs' Br. in Supp., p. 16; and see Plaintiffs' Reply Br., pp. 10 & n.4, 12.[5]

On the other hand, while plaintiffs have made no allegation in their complaint that "the air that lies within their domain" (Complaint, Count III, para. 3) is polluted

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[4] As a statutory reference to the federal policy, plaintiffs cite "42 U.S.C., § 1857(4)(8)." Although we can find no statute with this number, the reference is apparently to general congressional findings and purposes of the Clean Air Act, which we discuss *infra* pp. 10-11.

[5] In their virtually identical district court complaints, eight of the present plaintiffs allege pendent jurisdiction over Count III. Defendants' Supp. Mem., pp. 7-8, 34 n.44.

During the district court pretrial hearing of February 17, 1972 (see note 12 on page 12), Fredric C. Tausend, Special Assistant

by emissions from motor vehicles operated outside of, or across, their respective state borders, they nonetheless assert in their Supplemental Memorandum of Law that the emissions from motor vehicles manufactured by the defendants constitute a "national nuisance" and that Count III is therefore governed by "an interstate or national common law." Plaintiffs' Supp. Mem. of Law, pp. 3-5. In urging that Count III states a claim under "interstate common law," plaintiffs rely on the fact that this Court has from time to time fashioned and applied a federal common law in original actions between States. *Id.*, p. 3. They further assert that this Court applied federal common law in at least one suit by a State against the citizens of another State, namely, *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907). *Id.*, p. 4.

Plaintiffs' line of argument entirely misapprehends the principles established by this Court to determine whether "federal common law" or state law is applicable in actions brought in the Supreme Court and other federal courts. This Court's decisions demonstrate that under the regime of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), any common law applied in actions in the federal courts must be state common law, unless it can be demonstrated that the effectuation of a federal constitutional or statutory policy requires that one or more of the issues in the action be determined exclusively by federal common law. Moreover, the basic constitutional presumption in favor of State competence elucidated in the *Erie* decision [6] is rein-

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Attorney General for the State of Washington, counsel of record for plaintiff States here and for eight States in their district court complaints, stated as follows:

> "We don't think this is a nuisance action, as Mr. Verleger suggests. We are now convinced and think that it is an antitrust action, and so we have now stricken Count Three." Transcript, p. 116.

[6] The presumption in favor of the application of State law, and against the application of federal common law, is expressed in the Rules of Decision Act, 28 U.S.C. § 1652. The constitutional sources of the presumption are ably explored in Hart, *The Relations*

forced here by the only federal policy implicated by Count III of plaintiffs' Complaint—Congressional declaration in the Clean Air Amendments of 1970 that the problem of emissions from vehicles already in use should be dealt with by the States, and not by the federal government. This policy obviously strengthens, rather than rebuts, the *Erie* presumption in favor of the application of state law to plaintiffs' "nuisance" claim.

A correct analysis of the question of what law applies to Count III must begin with the recognition that it is the nature of the interests involved—State or federal—and not the identity of the parties—United States, State or private—that primarily determines the source of applicable law. "[E]nclaves of federal judge-made law which bind the States" have been created where "necessary to protect uniquely federal interests," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), and these federal interests may be present, along with State interests, in actions involving a variety of parties. Thus issues both of "federal common law" and of state law have arisen in actions between private parties (*e.g.*, *Bank of America* v. *Parnell*, 352 U.S. 29 (1956)), in actions between States (compare *Texas* v. *New Jersey*, 379 U.S. 674 (1965), with *Arkansas* v. *Texas*, 346 U.S. 368 (1953)) and in actions involving the United States (compare *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), with *United States* v. *Yazell*, 382 U.S. 341 (1966)). None of the few post-*Erie* decisions of this Court involving an action between a State and a citizen of another State has involved the application of "federal common law." And last Term in *Ohio* v. *Wyandotte*

Between State and Federal Law, 54 Colum. L. Rev. 489, 497-98, 525-39 (1954); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 544-45 (1954); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 810-14 (1957).

Chemicals Corp., 401 U.S. 493 (1971), the applicability of federal law was expressly rejected.[7]

In *Erie* the Court laid down the basic principle for determining the source of applicable law in all kinds of actions in the federal courts:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law." 304 U.S. at 78.

In *Hinderlider* v. *La Plata River Co.*, 304 U.S. 92 (1938), decided the same day as *Erie*, and in subsequent decisions, the Court has frequently been required to develop or approve "federal judge-made law." But unlike "the free-wheeling days antedating *Erie*," *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963), the instances where federal common law is created have been restricted to situations in which federal interests, as expressed in the Constitution or in federal statutes, have required that a uniform federal rule displace state law as the basis of decision.

Thus, because the logic of the Constitution excludes state competence in these areas, federal judge-made law has been held to govern such matters of potential conflict between States as the construction of interstate compacts, *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951), interstate boundary disputes, and the apportionment of interstate waters. *Hinderlider* v. *La Plata River Co.*, *supra*. Similarly, since States have no foreign relations responsibility under the Constitution, federal common law governs determinations of the validity of acts of a foreign government. *Banco National de Cuba* v. *Sabbatino*, *supra*. Federal interests expressed in acts of Congress have likewise from time to time necessitated the

[7] Because *Georgia* v. *Tennessee Copper Co.*, *supra*, antedates *Erie*, the source of law problem was not perceived as an important constitutional question, and there is little point in examining the decision for indications as to what law the Court thought it was applying. For what it is worth, however, passages such as the

formulation of a "federal common law" to displace state law. See, *e.g.*, *Clearfield Trust Co.* v. *United States*, *supra*; *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Hanna* v. *Plumer*, 380 U.S. 460 (1965).

Conversely, the *Erie* mandate of respect for State interests has dictated a conservative approach to parties' assertions that a federal interest is present requiring the application of federal common law. As this Court noted in *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966):

> "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing [such] transactions . . . ."

Moreover, even where a federal interest has been shown, there are "other questions relevant to invoking federal common law, such as the strength of the state interest in having its own rules govern," and "the feasibility of creating a judicial substitute." *Id.* *See also United States* v. *Brosnan*, 363 U.S. 237 (1960); *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U.S. 487 (1941).

The Court's approach of keeping the application of federal common law confined to situations which are relatively "few and restricted," *Wheeldin* v. *Wheeler*, *supra*, 373 U.S. at 651, rests on several practical consid-

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following suggest strongly that it was Georgia's laws which condemned the copper company's activities:

> "[Georgia] has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power." 206 U.S. 237.

erations of federalism, as well as on the requirements of the Constitution. Manifestly, it is desirable in most areas of substantive law that the States be permitted, where possible, to experiment with different legal rules and to tailor those rules to meet their own local needs. Rules of federal common law, however, must be uniform throughout the federal union, and under the Supremacy Clause they displace state laws inconsistent with them, in state courts as well as in federal courts. See *Hinderlider* v. *La Plata River Co.*, *supra*; *Banco Nacional de Cuba* v. *Sabbatino*, *supra*. Moreover, the development of a workable mutually consistent body of common law rules in a given field is a burden that can best be carried by the courts before which cases in that field are regularly heard. See Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1519 (1969). Thus, for example, the "application of state laws concerning taxes, *motor vehicles*, decedents' estates, business torts, government contracts, and so forth," *Ohio* v. *Wyandotte Chemicals Corp.*, *supra*, 401 U.S. at 497 (emphasis supplied), typically occurs in state courts, and it is the state courts which therefore should normally develop and apply such common law rules as are required in these fields. *Id.*

In light of these principles, the conclusion is inescapable that Count III should be adjudicated under state law (specifically, under the laws of each of the States seeking to abate the alleged "nuisance" created by motor vehicles manufactured by defendants), subject, of course, to any defenses available to the manufacturers based on the preemptive effect of federal air pollution legislation.[8] No provision of the Constitution or any federal statute requires this Court to develop a federal common law of motor vehicle emissions to override the police power of

[8] For reasons to be stated shortly, p. 10 & n.11, *infra*, the applicability of state law to the vehicle manufacturers is limited, so far as vehicle emissions are concerned, by the existence of federal statutory and administrative regulation of emissions from newly-manufactured cars.

the States in this field. No interstate conflict is suggested, and no reason appears for totally denying State power over motor vehicle emissions. Indeed, since the effect of vehicle emissions varies widely from State to State, and within each State as well, depending on local air conditions, population density and other variables,[9] this is a perfect example of a field in which local solutions and local experimentation ought not to be displaced by federal judge-made law.[10]

Any doubt on this score is dispelled by the fact that Congress has reached the same conclusion. As we have noted both in our original Brief In Opposition, pp. 22-24, and in our Supplemental Memorandum, pp. 26-28, Congress has made the States responsible for bringing local air into compliance with regional air quality standards, 42 U.S.C. §§ 1857c-2, -5 (1970), and as part of this regulatory scheme, it has expressly reserved to the States the power to regulate vehicle emissions (except for emission

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[9] See Defendants' Supp. Mem., pp. 28-29 and n.37.

[10] The decision of the Tenth Circuit Court of Appeals in *Texas* v. *Pankey*, 441 F.2d 236 (10th Cir. 1971), deserves only brief comment. In *Pankey* a federal district court dismissed for lack of diversity or other jurisdiction a suit by the State of Texas to enjoin New Mexico citizens from using pesticides which allegedly polluted the water supplies of Texas municipalities. The Court of Appeals reversed and authorized the district court to commence the creation of an entire body of federal judge-made law.

In light of the general principles discussed above, defendants believe that the *Pankey* decision is clearly wrong in holding that the claim pleaded arose under federal common law. Indeed, in the *Wyandotte* case—handed down a month after *Pankey*—this Court held that a claim essentially identical to that in *Pankey*, "if otherwise cognizable in federal district court, would have to be adjudicated under state law" and that there would be no "federal question jurisdiction . . . under 28 U.S.C. § 1331." 401 U.S. at 498-99 n.3. In any event, the *Pankey* court's holding on source of law is distinguishable from the instant case where, as we will show presently, Congress has now imposed federal emission control regulation on manufacturers of new vehicles and has expressly left to the States—and not federal judiciary—the making of law applicable to emissions from motor vehicles currently in use.

controls on newly-manufactured vehicles[11]). 42 U.S.C. § 1857f-6a(c) (1970); S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967). The Congressional decision to leave used car emissions to State control is buttressed by a finding that the problem is not manageable at the federal level. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 13-14 (1970). Since Congress has declined to exercise its legislative power over vehicles already in use and has left the matter to the States, it would be most inappropriate for this Court to regulate emissions from vehicles in use by invoking judge-made federal common law.

B. *Availability of Alternative Forums*

Irrespective of the applicable source of law, lower federal and state courts are available as forums to hear all of plaintiffs' claims, and consequently no reason exists for this Court to accept original jurisdiction in this case.

With regard to Count I, the availability of alternative forums is obvious. As defendants have pointed out previously, there are numerous federal district court forums in which plaintiffs can maintain this claim, forums which these same plaintiffs and other States have previously found adequate in other cases States have brought under the federal antitrust laws. Indeed all the plaintiffs in

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[11] Emissions from *new* vehicles have been subjected to direct federal control since 1965. Act of October 20, 1965, Public Law No. 89-272, 79 Stat. 992. See discussion in Defendants' Supp. Mem., pp. 18-20. State regulation of emissions from new vehicles before they are sold and become "used" is expressly preempted, 42 U.S.C. § 1857f-6a(a), as to all States except California, for which waivers of preemption may be granted under specified circumstances. 42 U.S.C. § 1857f-6a(b). Accordingly, plaintiff States cannot assert any "nuisance" claim, state or federal, against manufacturers for selling new vehicles that were subject to the federal emissions standards, since such a claim amounts to nothing more than an effort by the States retroactively to regulate emissions from newly-manufactured vehicles.

this proposed action have filed complaints against defendants in federal district courts containing the same antitrust claims and including the same prayers for relief as the complaint sought to be filed herein (as well as a prayer for damages), and alleging that the district courts have jurisdiction over these claims (as well as over Counts II and III). See Defendants' Supp. Mem., pp. 33-35. These complaints have all been consolidated by the Multidistrict Litigation Panel for pretrial proceedings in the Central District of California.[12]

Other forums than this Court are readily available to hear Count II of plaintiffs' complaint as well. Plaintiffs have incorporated into Count II all of the factual allegations of Count I and have stated that "[t]he evidence which would be introduced to prove Count II is identical to that needed to prove Count I." Plaintiffs' Supp. Mem. of Law, p. 2. If this is so, plaintiffs' common law conspiracy claim can be heard not only in the plaintiffs' own state courts (which, as this Court held in *Ohio* v. *Wyandotte Chemicals Corp., supra*, provide an adequate forum for trying state common law claims) but also in a federal district court. Having jurisdiction over the federal statutory antitrust claim, the district court would also have pendent jurisdiction over the state common law claim of Count II under the criteria laid down in *United*

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[12] The plaintiff States have now joined with other public body plaintiffs below in a proposal to the district court that they would amend their complaints to drop their damage cliams if the court would set a trial date of December 1972 for the remaining equitable claims of the public body plaintiffs. At a pretrial hearing on February 17, 1972, the court deferred final action on this proposal, pending further consideration after the issuance of notices to the members of the governmental classes pleaded by the plaintiff States and other public bodies in the district court complaints, notifying them of the class action proceedings and informing them of the proposal. The court has scheduled a further pretrial conference for March 7, 1972, to consider the form of the proposed notices.

Mine Workers v. *Gibbs*, 383 U.S. 715 (1966). See Defendants' Supp. Mem., p. 8 n.5.[13]

Lower federal and state courts also provide available forums in which plaintiffs can bring suit on the theory embodied in Count III of their present complaint regardless of the applicable source of law.

If this Court agrees with defendants that Count III presents a state claim, then plaintiffs will be able either to raise it in federal district court as ancillary to Counts I and II or to bring a separate action upon it in their own State courts. If the factual basis of Count III is sufficiently similar to Counts I and II that the plaintiffs should "be expected to try them all in one judicial proceeding," *United Mine Workers* v. *Gibbs, supra*, 383 U.S. at 725, the district court could properly exercise its pendent jurisdiction over Count III. See Defendants' Supp. Mem., pp. 7-8. On the other hand, if the claims in Count III are so different that pendent jurisdiction would not exist, there is no reason why this Court should make itself available as a tribunal simply to enable plaintiffs to join the antitrust and nuisance claims in one action, and plaintiffs should be required to bring their antitrust claim in the federal courts and their "nuisance" claims in their own State courts.

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[13] In their most recent brief that defendants have seen, plaintiffs have described Count II as

> "a contingent or supportive claim, included as a hedge against an argument . . . that the equitable relief available under Section 16 of the Clayton Act is less broad than the powers of an equity court at common law." Plaintiffs' Supp. Mem. of Law, p. 2.

To the extent plaintiffs' claim can be read as requesting a private, non-statutory remedy for violation of substantive rights under the federal antitrust statutes, then it presents a federal question cognizable in the district courts under 28 U.S.C. § 1331. *Cf. J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). The question of whether such a remedy exists can and should be answered in the first instance by the federal district courts in the pending lower court actions.

Should this Court accept plaintiffs' argument that Count III presents a federal claim, then a federal district court should have jurisdiction to hear it under 28 U.S.C. § 1331 (a). See, *e.g.*, *Texas* v. *Pankey*, 441 F.2d 236 (10th Cir. 1971); *Ivy Broadcasting Co.* v. *American Telephone & Telegraph Co.*, 391 F.2d 486, 492-93 (2d Cir. 1968); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (opinion of Brennan, J.); C. Wright, Law of Federal Courts § 60, at 250 (2d ed. 1970). Moreover, even if a claim based entirely on "federal common law" could be held not to "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331(a), such a claim, if presented in Count III, still might well be joined in the district court with Count I as a pendent claim. In such a situation the issue presented would be "so essentially one 'of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.'" *Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970).

In sum, regardless of the source of law applicable to the three counts of plaintiffs' complaint, lower federal and state courts afford available forums in which plaintiffs can bring their suit. Accordingly, the source of

law issue is no reason for this Court to accept original jurisdiction in this case.

Respectfully submitted,

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No. 45 Original

Feb. 26, 1972 - Special appendix (reporter's transcript) to Plaintiffs' memo. on choice of subst. law and brief in reply to Defentants' supplemental memorandum filed. NOT PRINTED. (See correspondence folder.)

FILE COPY

MOTION FILED

No. 8, Original

MAR 3 1972

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Supreme Court of the United States

OCTOBER TERM, 1971

STATE OF WASHINGTON, et al., *Plaintiffs*,

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GENERAL MOTORS CORPORATION, et al., *Defendants*.

Plaintiffs' Motion for Leave To File a Supplemental Memorandum After Argument

and

Supplemental Argument

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Printed by Byron S. Adams Printing, Inc., Washington, D. C.

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GENERAL MOTORS CORPORATION, et al., *Defendants.*

Plaintiffs' Motion for Leave To File a Supplemental Memorandum After Argument

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Pursuant to the provisions of Rule 9(2) and (6) and Rule 41(5) and (6) of the Rules of this Court, plaintiffs hereby move for leave to file a supplemental memorandum after argument in light of this Court's decision in *Hawaii* v. *Standard Oil Co.* (No. 70-49, decided March 1, 1972).

By clarifying the rules regarding actions brought by states under the antitrust laws on behalf of themselves and their citizens, the *Hawaii* case has a direct

and substantial impact on the present motion. In the memorandum, leave to file which is sought herein, plaintiffs will show that the need for this Court to exercise its original jurisdiction in order that the plaintiff states may obtain any meaningful relief in this litigation is even more urgent than appeared to be when this case was argued.

For the above stated reasons the plaintiffs' motion for leave to file a supplemental memorandum after argument should be granted.

Respectfully submitted,

FREDRIC C. TAUSEND
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657 Colman Building
Seattle, Washington 98104

March 2, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 45 Original

STATE OF WASHINGTON, et al., *Plaintiffs,*

v.

GENERAL MOTORS CORPORATION, et al., *Defendants.*

Plaintiffs' Supplemental Memorandum After Argument

This Court's decision in *Hawaii* v. *Standard Oil Co. of California* (No. 70-49, decided March 1, 1972) reinforces the need for this Court to exercise original jurisdiction in this case. In *Hawaii* this Court held that § 4 of the Clayton Act (the treble damage provision) is "notably different" from § 16 of the Act (which provides for injunctive relief) in that the former, although not the latter, requires a showing of injury to business or property. The Court also held that "the words 'business or property' * * * refer to commercial interests or enterprises." *Id.* p. 13. These holdings have important consequences for the present motion for leave to file a complaint.

Before *Hawaii* the retrofit relief sought here appeared to be the most adequate relief potentially available to repair the damage done by the defendants' antitrust conspiracy. In the light of *Hawaii,* moreover, it is the *only* relief adequate to repair such damage. This Court in *Hawaii* reaffirmed the breadth of § 16 of the Clayton Act, including suits by states, while at the same time narrowing the scope of treble damage actions which states can bring under § 4.

The result is that the equitable remedy sought here and the need for speed in order to obtain any adequate relief are now even more urgent than they were when this case was argued. As time goes on, the pre-1968 cars continue to pollute the air and thereby cause injury for which, under *Hawaii,* treble damages are largely not recoverable. Moreover, defendants' incentive to delay, already great,[1] is further increased by the substantial reduction in their exposure to treble damages.

Of course, these arguments would be beside the point if the retrofit remedy were obviously not feasible.[2] On that issue the recognition of the states' right to sue on behalf of itself and its citizens for injunctive relief under § 16 of the Clayton Act is highly significant. For the powers of a court of equity are far more

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[1] The number of cars which would be subject to retrofit is reduced at an annual rate of approximately 8 million cars (a reduction in retrofit cost to the defendants of an estimated $160 million per year).

[2] This is not the same question as whether the retrofit remedy will ultimately be deemed appropriate after proof of violation. Resolution of the latter question would be premature, since the case is presently before this Court on a motion for leave to file a complaint.

flexible where the state is seeking the injunction than it would be if private individuals were suing as representatives of a class. For, while this Court could not fashion a decree which would directly require individual users of pre-1968 automobiles to retrofit their cars, that power is by no means necessary to make a retrofit decree effective. The increased public concern for a clean environment, the widespread public anger over smog, and the fact that the defendants would be required to pay for the devices and their installation make it reasonable to expect that a great many citizens in the 34 states before this Court would voluntarily have their automobiles retrofitted. If, however, the Court believed that the effectiveness of the retrofit remedy would require more than the voluntary cooperation of citizens, it has the power to impose on any plaintiff state[3] the condition that within a reasonable time it enact mandatory retrofit legislation. In *Inland Steel Co.* v. *United States,* 306 U.S. 153, 156 (1939), this Court said:

> "A Court of equity 'in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as

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[3] As far as the nationwide effectiveness of such a decree is concerned, the 34 states now before this Court (plaintiffs and amici) represent 75% of the total population of the United States (152,524,192 people, resident population, 1970 census figures). Moreover, the remaining 16 states would undoubtedly seek to intervene prior to the conclusion of this action.

a court of equity, and has been exercised from time immemorial.'" (Footnote omitted.)

The question whether the imposition of such a condition is just and proper is, of course, one of federal law, specifically one of the application of § 16 of the Clayton Act. Indeed, in their supplemental memorandum on the source of law, filed after the possibility of this condition was suggested,[4] defendants concede that the questions in this case relating to the antitrust counts are covered by federal law.[5] The question does not cease to be such because it may involve a requirement that the state enact appropriate legislation. Cf. *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 434 (1964); *Textile Workers Union* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 457 (1957).

Such a procedure is customarily followed in legislative reapportionment cases where, since *Reynolds* v. *Sims,* 377 U.S. 533, 586, it has been recognized to be most desirable for the state to enact its own legislative apportionment plan. In cases where that procedure is followed the court of equity postpones entering a final decree until the state has had reasonable opportunity to act. If the legislature does act, the court then determines, according to federal standards, whether the new legislation comports with its original decision; its

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[4] In his oral argument, counsel for defendants asserted that plaintiffs had conceded in the District Court that the retrofitting remedy would be appropriate only if the plaintiff states enacted legislation requiring retrofitting of used cars. Plaintiffs made no such concession. The entire statement of plaintiffs' counsel, which is completely consistent with plaintiffs' position here, appears at pp. 101-103 of the transcript of the District Court hearings which has been submitted to this Court, and was in response to an argument made at Tr. 95-97.

[5] Defendants' Source of Law Memorandum at pp. 2-3.

final decree then depends on whether that federal standard has been met. So here the Court could fashion a decree which would give the states a reasonable time to enact mandatory retrofit legislation. If adequate legislation were not passed, the obligation of the defendants could be terminated or appropriately modified.

Respectfully submitted,

FREDRIC C. TAUSEND
Special Assistant Attorney General
State of Washington

March 2, 1972

WASHINGTON ET AL. v. GENERAL MOTORS CORP. ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 45, Orig. Argued February 28–29, 1972—
Decided April 24, 1972

Eighteen States have filed a motion for leave to file a bill of complaint against the Nation's four major automobile manufacturers and their trade association, alleging a conspiracy in violation of the federal antitrust laws, a common-law conspiracy in restraint of trade to restrain the development of motor vehicle air pollution control equipment, and a public nuisance in violation of state and federal common law. Those States seek an injunction, *inter alia*, requiring the defendants to accelerate a research and development program to produce effective pollution control devices and pollution-free engines and to install anti-pollution equipment in all vehicles they manufactured during the alleged conspiracy. *Held:* Though the Court has original but not exclusive jurisdiction, it exercises discretion to avoid impairing its ability to administer its appellate docket. In view of the nature of the relief requested and the availability of the federal district courts as an alternative forum, the Court declines to assume jurisdiction. As a matter of law as well as of practical necessity, remedies for air pollution must be considered in the context of local situations, making it advisable that this controversy be resolved in the appropriate federal district courts. Pp. 113–116.

Motions of North Dakota and West Virginia to be joined as parties plaintiff granted. Motion for leave to file bill of complaint denied and parties remitted to other federal forum.

DOUGLAS, J., delivered the opinion of the Court, in which all members joined except POWELL, J., who took no part in the consideration or decision of the case.

Fredric C. Tausend, Special Assistant Attorney General of Washington, argued the cause for plaintiffs. With him on the briefs were *Slade Gorton,* Attorney General of Washington, *William L. Dwyer* and *David G. Knibb,* Special Assistant Attorneys General; *William J. Scott,* Attorney General of Illinois, and *Robert S. Atkins* and *David C. Landgraf,* Assistant Attorneys Gen-

eral; *Gary Nelson*, Attorney General of Arizona, and *Malcolm P. Strohson*, Assistant Attorney General; *Duke W. Dunbar*, Attorney General of Colorado, *John Moore*, Deputy Attorney General, and *William Tucker*, Assistant Attorney General; *Bertram T. Kanbara*, Attorney General of Hawaii, and *George Pai*, Deputy Attorney General; *W. Anthony Park*, Attorney General of Idaho, and *Richard Greener*, Deputy Attorney General; *Richard C. Turner*, Attorney General of Iowa; *Kent Frizzell*, Attorney General of Kansas, and *Richard Hayse*, Assistant Attorney General; *James S. Erwin*, Attorney General of Maine; *Robert H. Quinn*, Attorney General of Massachusetts, and *Neal Colicchio*, Assistant Attorney General; *Douglas M. Head*, Attorney General of Minnesota; *John C. Danforth*, Attorney General of Missouri; *Helgi Johanneson*, Attorney General of North Dakota, and *Paul M. Sand*, First Assistant Attorney General; *Paul W. Brown*, Attorney General of Ohio, and *Donald Weckstein*, Assistant Attorney General; *Herbert F. DeSimone*, Attorney General of Rhode Island; *James M. Jeffords*, Attorney General of Vermont, and *John D. Hansen*, Assistant Attorney General; *Andrew P. Miller*, Attorney General of Virginia, and *Anthony F. Troy*, Assistant Attorney General; *Chauncey H. Browning, Jr.*, Attorney General of West Virginia, *Gene Hal Williams*, First Deputy Attorney General, and *James G. Anderson III*, Assistant Attorney General.

Lloyd N. Cutler argued the cause for defendants. With him on the briefs were *Howard P. Willens, Jay F. Lapin, Louis F. Oberdorfer, James S. Campbell, Julian O. Von Kalinowski*, and *Paul G. Bower* for Automobile Manufacturers Assn., Inc.; *Walter J. Williams* and *Forrest A. Hainline, Jr.*, for American Motors Corp.; *Tom Killefer, William E. Huth, G. William Shea*, and *Philip K. Verleger* for Chrysler Corp.; *Robert L. Stern* and *Carl J. Schuck* for Ford Motor Co.; *Ross L. Malone, Robert A. Nitschke, Hammond E. Chaffetz, Joseph Du-*

Coeur, Marcus Mattson, and *Richard F. Outcault, Jr.,* for General Motors Corp.

Brief for Alabama et al. as *amici curiae* in support of plaintiffs' motion for leave to file bill of complaint was filed by *J. Lee Rankin, David I. Shapiro,* and *Jerome S. Wagshal,* and by the following Attorneys General for their respective States: *William J. Baxley* of Alabama, *John E. Havelock* of Alaska, *Evelle J. Younger* of California, *Robert L. Shevin* of Florida, *Jack P. F. Gremillion* of Louisiana, *Francis B. Burch* of Maryland, *A. F. Summer* of Mississippi, *Robert List* of Nevada, *David L. Norvell* of New Mexico, *Louis J. Lefkowitz* of New York, *Larry Derryberry* of Oklahoma, *J. Shane Creamer* of Pennsylvania, *Daniel R. McLeod* of South Carolina, *Gordon Mydland* of South Dakota, *Crawford C. Martin* of Texas, and *Robert W. Warren* of Wisconsin.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Plaintiffs are 18 States who, by this motion for leave to file a bill of complaint, seek to invoke this Court's original jurisdiction under Art. III, § 2, cl. 2, of the Constitution.[1] Named as defendants are the Nation's four major automobile manufacturers and their trade association.

Plaintiffs allege a conspiracy among the defendants to restrain the development of motor vehicle air pollution control equipment. They allege that the conspiracy began as early as 1953 but was concealed until January 1969. Count I of the proposed complaint charges a violation of the federal antitrust laws. Count II charges a common-law conspiracy in restraint of

[1] Fifteen States originally moved for leave to file a bill of complaint. We subsequently granted leave to the State of Idaho to intervene as plaintiff. 403 U. S. 949. By today's decision we also grant leave to the States of North Dakota and West Virginia to be joined as parties plaintiff.

trade independently of the Sherman and Clayton Acts.[2] In their prayer for relief, plaintiffs seek an injunction requiring the defendants to undertake "an accelerated program of spending, research and development designed to produce a fully effective pollution control device or devices and/or pollution free engine at the earliest feasible date" and also ordering defendants to install effective pollution control devices in all motor vehicles they manufactured during the conspiracy and as standard equipment in all future motor vehicles which they manufacture. Other prophylactic relief is also sought.

The proposed complaint plainly presents important questions of vital national importance. See, *e. g.*, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 90th Cong., 1st Sess. (1967). Our jurisdiction over the controversy cannot be disputed. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230. For reasons which will appear, however, we deny leave to file the bill of complaint.

The gravamen of plaintiffs' allegations is a horizontal conspiracy among the major automobile manufacturers to impede the research and development of automotive air pollution control devices. See generally L. Jaffe & L. Tribe, Environmental Protection 141–180 (1971). It

[2] A third count of plaintiffs' proposed complaint also charged "a public nuisance contrary to the public policy of the Plaintiff States . . . [and] the federal government." Motion for Leave to File Bill of Complaint 12. In a memorandum filed with this Court Feb. 19, 1972, however, plaintiffs struck this count from their proposed complaint; but Idaho, the intervenor, did not join in that motion. In light of our disposition of Counts I and II of the bill of complaint, Idaho's motion for leave to file a bill of complaint solely for Count III should be denied *a fortiori*. Should any of the plaintiffs desire to renew the public nuisance count of the bill of complaint in the District Court, they are free to do so under our decision today in *Illinois* v. *City of Milwaukee*, *ante*, p. 91.

is argued that the facts alleged in support of the statutory and common-law claims are identical and that they could be elicited as well by a Special Master appointed by this Court as by a federal district court judge, and that resort to a Special Master would not place a burden on this Court's time and resources substantially greater than when we hear an antitrust case on direct appeal from a district court under the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29. And it is argued that the sheer number of States that seek to invoke our original jurisdiction in this motion is reason enough for us to grant leave to file.[3]

The breadth of the constitutional grant of this Court's original jurisdiction dictates that we be able to exercise discretion over the cases we hear under this jurisdictional head, lest our ability to administer our appellate docket be impaired. *Massachusetts* v. *Missouri*, 308 U. S. 1, 19; *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 497–499; H. Hart & H. Wechsler, The Federal Courts and the Federal System 258–260 (1953); Woods & Reed, The Supreme Court and Interstate Environmental Quality: Some Notes on the *Wyandotte* Case, 12 Ariz. L. Rev. 691; Note, 11 Stan. L. Rev. 665, 694–700. In *Massachusetts* v. *Missouri*, *supra*, at 18–19, where Massachusetts sought to invoke our original jurisdiction in order to collect a tax claim, we said:

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction . . . is necessary for the State's protection. . . . To open this Court to

[3] In addition to the 18 States which are plaintiffs, 16 other States and the City of New York have filed a brief as *amicus curiae* supporting plaintiffs' motion for leave to file a bill of complaint.

> actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it."

By the same token, we conclude that the availability of the federal district court as an alternative forum and the nature of the relief requested suggest we remit the parties to the resolution of their controversies in the customary forum. The nature of the remedy which may be necessary, if a case for relief is made out, also argues against taking original jurisdiction.

Air pollution is, of course, one of the most notorious types of public nuisance in modern experience. Congress has not, however, found a uniform, nationwide solution to all aspects of this problem and, indeed, has declared "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." 81 Stat. 485, 42 U. S. C. § 1857 (a)(3). To be sure, Congress has largely preempted the field with regard to "emissions from new motor vehicles," 42 U. S. C. § 1857f–6a (a); 31 Fed. Reg. 5170 (1966); and motor vehicle fuels and fuel additives, 84 Stat. 1699, 42 U. S. C. § 1857f–6c (c)(4). See Currie, Motor Vehicle Air Pollution: State Authority and Federal Pre-emption, 68 Mich. L. Rev. 1083 (1970); Hill, The Politics of Air Pollution: Public Interest and Pressure Groups, 10 Ariz. L. Rev. 37, 44–45 (1968); Stevens, Air Pollution and the Federal System: Responses to Felt Necessities, 22 Hastings L. J. 661, 674–676 (1971). It has also pre-empted the field so far as emissions from airplanes are concerned, 42 U. S. C.

§§ 1857f–9 to 1857f–12. So far as factories, incinerators, and other stationary devices are implicated, the States have broad control to an extent not necessary to relate here.[4] See Stevens, *supra, passim;* Comment, 58 Calif. L. Rev. 1474 (1970). But in certain instances, as, for example, where federal primary and secondary ambient air quality standards have been established,[5] 42 U. S. C. §§ 1857c–4 and 1857c–5, or where "hazardous air pollutant[s]" have been defined, 42 U. S. C. § 1857c–7, there may be federal pre-emption. See 42 U. S. C. § 1857c–8 *et seq.* Moreover, geophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution. See Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 90th Cong., 1st Sess., 130 (1967); Coons, Air Pollution & Government Structure, 10 Ariz. L. Rev.

[4] Because federal motor vehicle emission control standards apply only to new motor vehicles, States also retain broad residual power over used motor vehicles. Moreover, citizens, States, and local governments may initiate actions to enforce compliance with federal standards and to enforce other statutory and common-law rights. 42 U. S. C. § 1857h–2.

[5] National primary ambient air quality standards are those "which in the judgment of the Administrator [of the Environmental Protection Agency] . . . are requisite to protect the public health . . . ." 42 U. S. C. § 1857c–4 (b)(1). Secondary ambient air quality standards are those "requisite to protect the public welfare," 42 U. S. C. § 1857c–4 (b)(2), which "includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U. S. C. § 1857h (h). For implementation plans for primary and secondary ambient air quality standards, see 42 U. S. C. § 1857c–5.

Rules and regulations setting ambient air quality standards have been promulgated by the Environmental Protection Agency. 36 Fed. Reg. 22384 (1971).

48, 60–64 (1968). Thus, measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates.

As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations.[6] We conclude that the causes should be heard in the appropriate federal district courts.[7]

The motions of the States of North Dakota and West Virginia to be joined as parties plaintiff are granted. The motion for leave to file a bill of complaint is denied and the parties are remitted without prejudice to the other federal forum.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

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[6] It was in recognition of this fact that Congress directed the Administrator of the Environmental Protection Agency to "designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards." 42 U. S. C. § 1857c–2 (c).

[7] Multi-district litigation apparently involving the same factual claims as are presented here has been consolidated in the District Court for the Central District of California and pretrial proceedings are already underway. See *In re Motor Vehicle Air Pollution Control Equipment*, 311 F. Supp. 1349 (Jud. Panel on Multidist. Lit. 1970).